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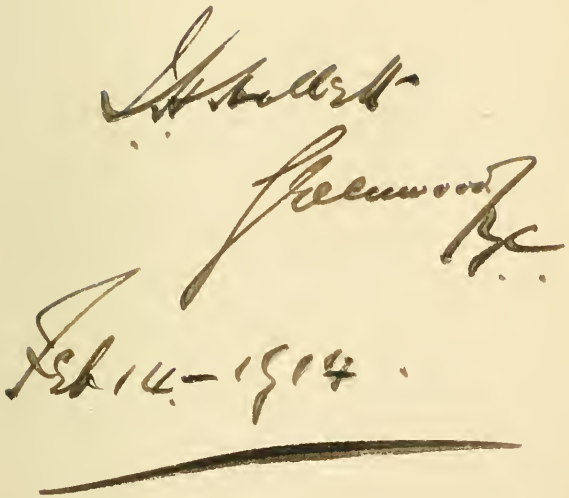

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THE LAW RELATING TO CHEQUES

BY

ERIC R. WATSON, LL.B. (LONDON)

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PREFACE

TO THE FOURTH EDITION.

The third edition of this work being now exhausted, I have taken this opportunity of thoroughly revising and enlarging the present edition. Not only have the many decisions of the last ten years been inserted, but much new matter—as, for instance, that dealing with the personal liability of directors on cheques signed on behalf of companies—has been added. On this particular point, I would merely say here that the view taken by Mr. Justice Scrutton in *F. Stacey & Co.* v. *Wallis* (106 L.T. 544) is that under the Companies Act, 1908, —it is not necessary that the directors should add the name of the company if it is anywhere "mentioned" on the instrument in drawing cheques or accepting bills. Yet if section 25 of the Bills of Exchange Act applies to such cases, the addition of words by the directors, indicating that they sign on behalf of the company, is necessary to exclude personal liability,—at least so the late Mr. Justice Jelf held in *Landes* v. *Marcus*.

It is difficult to see why section 25 should be applied where the instrument in itself shows a principal who can be sued. On this point I agree with the observa-

tions in the "Solicitors' Journal" in Volume 53 at pages 334 and 425. In other words, if section 77 of the Companies Act, 1908, be satisfied, section 25 of the Bills of Exchange Act is not to be applied.

I feel it advisable to retain the argumentative passages on the doctrine of *Young* v. *Grote*. Of the text-books which have appeared since Marshall's case, only one of the first authority, Sir M. Chalmers's well-known monograph, definitely abandons the decision as no longer law. Others, like "Grant on Banking," regard it as still open to the supreme tribunal to follow that decision,—and I think counsel would incur a grave responsibility if he advised a banker client on like facts that there was not at least a fighting chance.

The final chapter on Limitation of Actions has been cut out, the really pertinent matter in it being transferred. Some other matter has been excised as no longer necessary—the most important being the statement of the effect of the common law authorities as to what is a "reasonable time" for presenting a bill on demand.

A very careful perusal of these cases has led me to think that they have little value in assisting to determine the question.

They all date from a time when crossing was not recognized by statute, and so far as they suggest (as in *Alexander* v. *Burchfield*) that the payee of a crossed cheque must get it presented the day after receipt are plainly not in accord with the usage of the present day. Further, I agree with Sir J. Paget that in these days not

even open cheques are bound to be presented personally —so that the common law rule as to the duty to present on the next business day seems to belong to a past age of bearer cheques and a less universal use of the clearing houses. Any delay consequent on collection through a clearing house or a clearing agent would doubtless be held reasonable. It is curious that no authority illustrates the position of an indorser, who claims to be discharged under section 45 (2). The drawer's position is clear—section 74 merely varying the extent of his discharge from what it was at common law and probably introducing a less rigorous measure of "reasonable time".

But an indorser might be called on to pay—not from any failure of the bank, but simply from the drawer having no effects. Is he free from liability to his indorsee merely because the latter delayed a day or two before paying in the cheque?

Suppose that if it had been presented promptly, it would still have been refused as "not provided for," what is the prejudice the indorser has suffered by the delay, that entitles him to his discharge? Yet on the wording of the Act, he would seem to be discharged, and it is difficult to imagine two standards of "reasonable time"—one to charge the drawer, the other the indorser.

In many other respects the law seems anomalous—e.g. as regards the drawer's right to notice of dishonour —a false analogy from the law of bills, and in others it is very confused, as in the case of gaming considerations. Is *Beeston* v. *Beeston* still law? If so, why was

it not cited in *Saffery* v. *Mayer?* Or is the decision affected by the Gaming Act, 1892? It is satisfactory to know that His Honour Judge Parry, by refusing very recently to follow *Lynn* v. *Bell*, with leave to appeal, has given the betting world the opportunity of having the law settled upon the much discussed 5 & 6 Will. IV, c. 41, section 2.

His Honour Judge Shand in *Charles* v. *Baldwin* (1913), 2 L.J. C.C. 47, has also, quite lately, interpreted that decision as limiting the right to recover from the payee to cases where the amount of the cheque has been paid to an indorsee from the original payee. On the wording of the section, this seems correct.

While I have excised or condensed some argumentative passages—such as that dealing with the proper direction to the jury in the case of alleged "overdue" cheques—it being scarcely maintainable, apart from the wording of section 36 (3), since *Raphael* v. *Bank of England* that "circumstances, which *ought* to have excited suspicion" can affect a *bonâ fide* transferee—others will be found on difficult points, such as the view taken of the limitation placed by two colonial decisions on section 60 (pp. 100-1).

Too late for insertion in the text, I may here note *Walker* v. *Manchester, etc., Banking Co.* (1913), 29 T.L.R. 492, following *Kepitigalla Rubber Estates* v. *National Bank of India.*

ERIC R. WATSON.

INNER TEMPLE,
May, 1913.

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THE

LAW RELATING TO CHEQUES.

CHAPTER I.

DEFINITION.

1.—A cheque is a bill of exchange drawn on a banker payable on demand. (Section 73.) (*a*)

It is not an assignment of money in a banker's hands. Cf. *Hopkinson* v. *Forster*, 1874, L.R. 19 Eq. 74.

By construing section 73 with section 3, which defines a bill of exchange, we get the following definition of a cheque: "A cheque is an unconditional order in writing addressed by one person to another, being a banker, requiring the person to whom it is addressed to pay on demand a sum certain in money to or to the order of a specified person or to bearer".

A cheque, with a receipt form attached, with this order, "Pay —— provided receipt form at foot hereof is duly signed, stamped and dated," is not a cheque within the Act, and it is doubtful if it is brought within sections

(*a*) A reference to a section without citing any Act is a reference to the Bills of Exchange Act, 1882, hereinafter referred to as "the Act".

76-82 by the operation of section 17 of the Revenue Act.(*b*)

But a cheque in this form, "Pay Mr. N. or order, one hundred and twenty-six pounds," and below the drawer's signature, "The receipt at back hereof must be signed, which signature will be taken as an indorsement of the cheque," and on the back, "Received from —— this cheque for £126. (Sd.) H. N.," was held to be a negotiable instrument, as the words at the foot were not addressed to the bankers, and did not affect the nature of the order to them.(*c*)

Words at the foot of a cheque, such as "This cheque will not be honoured after three months from date of issue," do not, it seems, make the order to pay conditional, so as to take the cheque out of the Act.(*d*)

Words on the back of a cheque, purporting to be an assignment of copyright, which are commonly inserted in cheques issued to contributors by Magazine Syndicates, etc., would appear, unless construable as a statement of the transaction giving rise to the cheque, to exclude such cheques from the definition of cheques within the Act.

(*b*) *Bavins, Jun., and Sims* v. *London and South-Western Bank* (1899), 5 Com. Cas. 1; *London City and Midland Bank* v. *Gordon* [1903], A.C. 240, at p. 252, but see Paget's "Banking," pp. 58-9.

(*c*) *Nathan* v. *Ogdens, Ltd.* (1905), 93 L.T. 553, *coram* A.T. Lawrence, J. Paget does not cite this case. Class (8) in *Capital and Counties Bank* v. *Gordon* [1903], A.C. 240, which were held by Lord Lindley not to be within the Act, or within section 17 of the Revenue Act, 1883, or section 19 of the Stamp Act, 1853, were "payable only on signature by the payees of a form of receipt" (at p. 252). Thus they were "conditional orders".

(*d*) Cf. *Thairlwall* v. *Great Northern Railway* [1910], 2 K.B. 503 at pp. 518-20. Cf. *contra*, Paget's "Banking," 61.

The chief differences between a bill and a cheque are :—

(1) Bills are payable on demand or at a fixed and determinable future time, e.g. three months after date or after sight. Cheques are always payable on demand. There are thus no "days of grace" in the case of cheques. Bills are intended for circulation; cheques for immediate payment.

(2) A cheque requires no presentment for acceptance and no acceptance.(*e*) The addressee of a cheque is not like the addressee of a bill, who, by accepting, becomes liable, if he dishonour the bill on presentment for payment, to a holder. A banker, if he dishonour a cheque, is not liable to the holder, but only to the drawer.

(3) Notice of dishonour is rarely necessary in case of a cheque, to charge the drawer, as it is excused if payment is countermanded, or the banker has no effects of the customer, the two common causes of dishonour. There is no noting or protesting of cheques on dishonour.

(4) A penny stamp covers any amount on a cheque, provided it be not post-dated ; but a bill requires an *ad valorem* stamp, if payable more than three days after sight or after date.

For further essentials of a valid bill, and by the opera-

(*e*) Acceptance of cheques is recognized by American Law, section 323 of the N.Y. Neg. Instrs. Law making it equivalent to acceptance. Section 324 provides that if the holder procures a cheque to be certified, the drawer and indorsers are discharged. By section 325 a certified cheque operates as an assignment of funds. Over thirty other States have similar provisions. These provisions may foreshadow English legislation on the subject, should the practice be universally adopted here. The custom of certifying cheques will be considered later (*post*, p. 128).

tion of section 73, of a cheque, the reader is referred to section 3, which it is not thought material here to set out.

2.—A cheque is transferable in its origin unless it contains words prohibiting transfer. Where a cheque is transferable in its origin, it continues to be transferable until it has been—

(a) Restrictively indorsed, or

(b) Discharged by payment or otherwise.

A cheque transferable in its origin is also negotiable, unless it is crossed not negotiable. Where a cheque is negotiable in its origin it continues to be negotiable until it has been—

(a) Crossed not negotiable by a holder thereof, or

(b) In circulation for an unreasonable length of time, or

(c) Restrictively indorsed but not so as to prohibit further transfer.

(Sections 36, 76, 77, and 81.)

The difference between a negotiable instrument and a merely transferable one is of the utmost importance. A cheque may be rendered not negotiable. It may also be drawn not even transferable or so rendered, it would seem, by restrictive indorsement, under section 35 (1).(*f*)

A negotiable instrument is such an instrument that (1) the title to it passes by delivery, with or without indorsement, as the case may be, without the need for executing a transfer or assignment. (2) A *bonâ fide* holder for value, who has no notice, i.e. no positive knowledge as opposed to the means of knowledge (*g*) of any defect in

(*f*) As to the mode of drawing a non-transferable cheque see *post*, p. 39.

(*g*) See *Raphael* v. *Bank of England* (1855), 17 C.B. 161, and section 90 defining good faith.

the title of the transferor to him of the instrument, is not prejudiced in his rights to and upon it by reason of the existence of such a defect.

The definition in Chapter II of the "holder's" rights will further elucidate the point.

By 8 & 9 Vict. c. 38, section 16, cheques for under £1 drawn or issued in Scotland are void, and their negotiation in Scotland nominally punishable at the discretion of Justices with a fine of not less than £5 nor more than £20. But this provision, it is stated, is never enforced, and such cheques are freely negotiated. (Cf. Wallace and McNeil, "Banking Law," 3rd ed., 184; Hamilton's "Commentary on the B/E Act," 164.)

CHAPTER II.

PARTIES.

DRAWER—HOLDER—PAYEE—INDORSEE—INDORSEMENT—BANKER—CUSTOMER, CAPACITY OF PARTIES—PRINCIPAL AND AGENT.

THE DRAWER.

3.—The drawer of a cheque is the person who, by signing it, gives to the banker on whom it is drawn an unconditional order to pay it.

As we have seen, the insertion of words limiting the time after issue, within which the cheque will be paid, do not, it would seem, amount to a condition. (*a*)

4.—The drawer of a cheque by drawing it engages that on due presentment it shall be paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided the requisite proceedings on dishonour be duly taken. (Section 55.) (*b*)

That a holder may sue the indorser of a cheque is indisputable. See *Keene* v. *Beard* (1860), 8 C.B. N.S. 372.

Notice of dishonour is rarely necessary to charge the drawer of a cheque, as the common causes of dishonour, want of effects or orders not to pay, would amount to

(*a*) *Ante*, p. 2.

(*b*) Here and throughout the book the language of the Act is modified so as to be applicable to cheques alone.

circumstances dispensing with notice under section 50 (2, c).

Yet Sir John Paget thinks that, otherwise, the drawer, though the party primarily liable, like an acceptor, would be discharged by want of notice. ("Banking," p. 56.) Admittedly, nothing in terms forbids the application of section 48 to cheques, and the authority in favour of this anomaly is adequate. In *May* v. *Chidley* [1894], 1 Q.B. 451, Wills, J., said, "A defendant in an action on a dishonoured cheque is not indebted, unless notice of dishonour has been given". In *Carew* v. *Duckworth* (1869), L.R. 4 Ex. 313, it is plainly assumed that a drawer of a cheque is entitled to notice in the same manner as the drawer of a bill, even where he has been informed by the bank that it will not honour the cheque, provided he has funds to meet it; *per* Bramwell, B., at page 319, and see *Kemble* v. *Mills* (1840), 1 M. and G. 757, and *Serrell* v. *Derbyshire Railway Co.* (1860), 9 C.B. N.S. 811.

The discharge in such a case extends also to the consideration. *Peacock* v. *Pursell* (1863), 14 C.B. N.S. 728.

A specially indorsed writ must aver notice of dishonour, or facts excusing it, to the drawer of a cheque. *Fruhan* v. *Grosvenor* (1892), 61 L.J. Q.B. 717; but the affidavit verifying the cause of action need not. *May* v. *Chidley*, *supra*.

5.—The drawer of a cheque is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. (Section 55 (1, b).)

"Holder in due course" and "payee" are defined in 8 and 9 respectively.

6.—A holder is the payee or indorsee of a cheque who is in possession of it, or the bearer thereof. (Section 2.)

Bigham, J., in *Akrokerri Mines, Ltd.* v. *Economic Bank* [1904], 2 K.B. at page 472, defined a holder as 'every person who is in lawful possession of the instrument". Sir J. Paget criticizes this definition as at once "too wide and too narrow". ("Journal of the Institute of Bankers," XXVI. 257.) A man in lawful possession of an unindorsed order bill of another is not a holder; on the other hand, a man in dishonest possession of a stolen "bearer" cheque would be a "holder".

7.—The rights and powers of the holder of a cheque are as follows:—

(1) He may sue on the cheque in his own name. (*c*)

(2) Where he is a holder in due course, he holds the cheque free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the cheque. (*d*)

(3) Where his title is defective, (a) if he negotiates the cheque to a holder in due course, that holder obtains a good and complete title to the cheque; and (b) if he obtains payment of the cheque, the person who pays him in due course gets a valid discharge for the cheque. (Section 38.)

(*c*) Whether a bearer or order cheque. *Ancona* v. *Marks* (1862), 31 L.J. Ex. 163.

(*d*) Thus in *Lee* v. *Newsam* (1823), D. and R.N.P. 50, a tradesman, who took a cheque in exchange for goods and handed the purchaser the balance in cash, was entitled to recover, in the absence of negligence (the test would now be good faith) though the cheque had been stolen from the payee. The case is remarkable merely as a historical landmark in the law of cheques. That a tradesman should cash a "check" was relied on as a circumstance of such negligence, that he ought not to recover, even if he gave full value!

"In due course"; a banker paying in contravention of a crossing of a cheque would not pay in due course.

8.—A holder in due course of a cheque is a holder who has taken a cheque complete and regular on the face of it under the following conditions:—

(a) That he became the holder of it before it was overdue without notice that it had been previously dishonoured by non-payment, if such was the fact.

(b) That he took the cheque in good faith and for value, and that at the time the cheque was negotiated to him he had no notice of any defect in the title of the person who negotiated it. (Section 29 (1).)

Different views have been judicially expressed as to whether a payee, or other immediate party, can be a "holder in due course". Russell, C.J., thought not in *Lewis* v. *Clay* (1897), 67 L.J. Q.B. 224. It was doubted by the Divisional Court in *Herdman* v. *Wheeler* [1902], 1 K.B. 361. But in *Lloyd's Bank* v. *Cooke* [1907], 1 K.B. 794, Fletcher Moulton, L.J., at pages 805-9, gave cogent reasons why a payee might be a holder in due course. In *Talbot* v. *Von Boris* [1911], 1 K.B. 854, the section was not in issue, but Farwell, L.J., says of Fletcher Moulton, L.J.'s judgment, "I agree with that view" (at p. 865).

What is a defective title is considered in Chapters IV and VII. There are two cases where a *bonâ fide* holder for value does not acquire the rights of a holder in due course: (1) Where he takes a cheque bearing a forged or unauthorized signature not being an indorsement of a "bearer" cheque. (2) Where he takes a cheque crossed

"not negotiable" from a person having no title or a defective title thereto.

9.—The payee of a cheque is the person to whom or to whose order the cheque is payable.

10.—"Bearer" means the person in possession of a cheque which is payable to bearer, whether it was so drawn or has become so by reason of the only or the last indorsement being an indorsement in blank. (Sections 2 and 8.)

11.—Where a cheque is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. (Section 7 (1).)

"Pay to —— order" is payable to drawer's order. If payee's name is omitted, *semble* the cheque is payable to bearer. It is suggested that "To —— or order" is not valid, but section 20 (1) empowers a "person in possession" (as distinct from "a holder") to fill up the blank. (*e*)

12.—A cheque may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A cheque may also be made payable to the holder of an office for the time being. (Section 7 (2).)

Where the payee is a fictitious or non-existing person, the cheque may be treated as payable to bearer. (Section 7 (3).)

In *Bank of England* v. *Vagliano Brothers* [1891], A.C. 107, Vagliano had been in the habit of accepting trade bills drawn on him by V., a foreign correspondent, in favour of P. G., Vagliano's clerk, forged a series of bills purporting to be so drawn, and, obtaining Vagliano's acceptance, forged P.'s indorsement. It was held that, not-

(*e*) *Chamberlain* v. *Young* [1893], A.C. 206; *Daun* v. *Sherwood* (1895), 11 T.L.R. 211; "Grant on Banking," 10th ed., p. 16; Paget, 54.

withstanding P. was a genuine, existing person, he was "a fictitious person" within section 7 (3), so that the bills became payable to bearer, and could be debited by the bank to Vagliano. (*Per* Halsbury, C., and Lords Watson, Herschell, and Macnaghten). Lord Bramwell, dissenting, said of the argument, "That if V. had drawn the bill, P. was real and existent, but inasmuch as G. did not mean P. to have the bill, he was non-existent. This beats me" (at p. 138). Lord Field also dissented. Much turned in the appeal to the House of Lords on the negligence of both parties, a matter elsewhere noticed. In *Clutton* v. *Attenborough* [1897], A.C. 107, Clutton's clerk procured by fraudulent representations cheques to be drawn by Clutton in favour of a fictitious and non-existing person, "G. B.". The clerk indorsed the cheques "G. B." and negotiated them to Attenborough. It was held that "G. B." was a non-existing person within section 7 (3) and that it was immaterial that Clutton believed him to be real, when he drew the cheques. Clutton accordingly failed to recover the value of the cheques from the defendant. In *Vinden* v. *Hughes* [1905], 1 K.B. 795, the plaintiff was induced by the fraud of his clerk C. to sign cheques in favour of actual customers of his, who had sold him goods. These cheques C. cashed with the defendant, forging the indorsements. The defendant gave value in good faith. Warrington, J., distinguished *Clutton* v. *Attenborough* on the ground that the case of a "fictitious" as distinct from a "non-existing" person did not there arise, and Vagliano's case on the ground that the bills there were not bills, never being genuinely drawn, whereas the cheques in the present case "were perfectly

genuine". Holding the customers not to be "fictitious persons," he gave judgment for the plaintiff. In *North and South Wales Bank* v. *Macbeth*, and *North and South Wales Bank* v. *Irvine* [1908], A.C. 137, the facts were thus: Macbeth was induced by one W. to draw a cheque for £11,250 in favour of one K. or order. K. was an existing person, and Macbeth intended, when he drew the cheque, that K. should have the proceeds. W. forged K.'s indorsement and paid the cheque into his account at the appellant bank. The House of Lords held K. not to be a "fictitious person". Macbeth intended him to receive the money, and he was a living man. In Vagliano's case, the drawer (G.) never intended P. to receive the money. In Clutton's case, the payee was non-existent. In Irvine's case, W. advanced £2180 to Irvine to enable him to meet a cheque for £2300, which W. by fraud procured Irvine to draw payable to one D. W., as before, forged D.'s indorsement. The bank was held liable to Irvine for £2300, though his actual loss was that sum, less £2180, or £120. It was immaterial where Irvine procured the money to meet his cheque. The bank was unable to rely on section 82, presumably because it had collected the cheques as holder (the Act of 1906 became law subsequent to these operations). See [1906], 2 K.B., at p. 723. The prevailing view is to regard impersonal payees, e.g. "Wages," "Cash," "Expenses," as not "fictitious" within section 7 (3). (Paget's "Banking," pp. 51, 52; "Questions and Answers in Banking Practice," 6th ed., 51-3.) "Income Tax" requires indorsement by the collector of Inland Revenue, "Rates" that of the borough treasurer, etc. ("Questions and Answers," 6th ed., Nos. 726-7.)

13.—A negotiable cheque may be payable either to order or to bearer. (Section 8 (2).)

A cheque is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. (Section 8 (3).)

A cheque is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. (Section 8 (4).)

Where a cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option. (Section 8 (5).)

14.—"Indorsement" means an indorsement completed by delivery. (Section 2.)

15.—Where a person signs a cheque otherwise than as drawer, he thereby incurs the liabilities of an indorser to a holder in due course. (Section 56.)

A person, who indorses a cheque under section 56, merely to add the security of his name, may under section 16 indorse so as to negative or limit his liability upon it. Thus where A. indorsed a cheque drawn by B., in order to induce C., the payee, to take it in lieu of cash, adding "sans recours," A. was held not liable upon his indorsement which, being only written for the purpose of lending his name, and not to negotiate the cheque, was wholly valueless. (*Wakefield* v. *Alexander* (1901), 17 T.L.R. 217.)

16.—The indorser of a cheque by indorsing it—

(a) Engages that on due presentment it shall be paid according to its tenor, and that if it be dishonoured by non-payment he will compensate the holder or a subsequent indorser who is

compelled to pay it, provided the requisite proceedings on dishonour be duly taken.

See *Keene* v. *Beard* (1860), 8 C.B. N.S. 372.

Where the indorser is more substantial than the drawer, it would always be well to give him notice of dishonour. Countermand of payment, or the fact that the bankers had no effects of the drawer, would not excuse notice of dishonour as against the indorser.

By German cheque law (Art. 23), an indorser is liable, though the drawer's signature be forged. It would not appear to be so under our law. Section 56 would not apply, it should seem, to the signature of an instrument not really a cheque at all. Nor could such a signature be construed as the signature of a blank instrument.

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements.

(c) Is precluded from denying to his immediate or a subsequent indorsee that the cheque was at the time of his indorsement a valid and subsisting cheque, and he had then a good title thereto. (Section 55.)

17.—The indorsee of a cheque is the person to whom a cheque is specially indorsed, or any person being the bearer of a cheque indorsed in blank, i.e. any person who makes a title to a cheque through an indorsement.

18.—An indorsement in blank specifies no indorsee, and a cheque so indorsed becomes payable to bearer. (Section 34 (1).)

A special indorsement specifies the person to whom or to whose order the cheque is payable. (Section 34 (2).)

When a cheque has been indorsed in blank any holder may convert the blank into a special indorsement by writing above the indorser's signature a direction to pay the cheque to the order of himself or some other person. (Section 34 (4).)

Under section 72 of the Act the law to be applied in interpreting the indorsement (or the drawing) of a cheque is the law of the country where it was made. Thus where the plaintiffs sued the defendant bank for conversion of a cheque in their favour, which they had specially indorsed in Austria to G. E. in London, and their clerk stole the cheque and forged G. E.'s indorsement, the defendant bank acquiring the cheque in good faith and for value from the S. bank, where the forger cashed it, it was held that Austrian law must be applied, and, as under that law, the defendant bank would acquire a good title, there was judgment in its favour. (*Embiricos* v. *Anglo-Austrian Bank* [1905], 1 K.B. 677.)

19.—A banker on whom a cheque is drawn is under an obligation to the drawer to pay it on due presentment, provided he has sufficient (*f*) funds of the drawer in his hands wherewith to meet it, and provided also that he has received no revocation of authority to pay it by notice of death or by countermand or otherwise.

20.—A customer of a banker may recover from the banker substantial damages, without proof of actual damage, if on due presentment his cheque is not paid and the banker had in his hands sufficient funds of such customer wherewith to meet it or was otherwise under an obligation to meet it.

(*Rolin* v. *Steward* (1854), 23 L.J. C.P. 148; *Cumming* v. *Shand* (1860), 29 L.J. Ex. 129; and *Summers* v. *City Bank* (1874), L.R. 9 C.P. 580; *King* v. *Brit. Linen Co.* (1899), 36 S.L.R. 733.)

In *Rolin* v. *Steward* the Court held that the direction

(*f*) Whether he has or not may be difficult of proof. See generally *Bransby* v. *East London Bank* (1866), 14 L.T. N.S. 403, a case not establishing any particular principle.

of Campbell, C.J., at the trial, that, in the absence of proof of actual damage, the jury were to give, not nominal or excessive, but temperate damages, was right. In the older case of *Marzetti* v. *Williams* (1830), 1 B. and Ad. 415, it was held that an action would lie for dishonouring a cheque, but no direction was given on the question of the amount of damages, though Tenterden, C.J., expressed himself as if he thought they should be nominal, if no actual damage were proved. In *King* v. *British Linen Co.*, *supra*, the defendant bank was held liable for the damage to the plaintiff's financial reputation, they having dishonoured his cheque under these circumstances. He drew the cheque on 21 October. The bank wrote to him on the 22nd requesting him to pass no more cheques, as they intended to retain any money at his credit, pending the settlement of a claim by them. He replied that he drew the cheque in question prior to the receipt of their letter, and that if they dishonoured it his financial credit would be injured. The bank dishonoured the cheque on presentment through the clearing house, returning it marked, "Effects to be retained. Refer to Drawer."

In *Buckingham* v. *London City and Midland Bank* (1896), 12 T.L.R. 70, the plaintiff had a current and a loan account. The bank dishonoured cheques on the current account, without giving the plaintiff proper notice of closing the account, as the bank had over-advanced on the loan account. Mathew, J., took the findings of the jury that the accounts were by course of dealing separate, that the plaintiff was entitled to reasonable notice of dishonour and did not get it. Damages, £500.

It is a defence, where a banker dishonours the cheque

of a customer, drawn by him as executor or trustee, to show an intention on the drawer's part to commit a breach of trust by misapplication of the money, and that the banker was cognizant of it. *Gray* v. *Johnston* (1868), L.R. 3 H.L. 1.

Cumming v. *Shand* (1860), 29 L.J. Ex. 129, is a case of interest to commercial men. The facts were as follows:—

The defendants, bankers, took up bills for the plaintiff, their customer, on the security of the produce of consignments, and by a course of dealing they permitted him to draw on his current account, without reference to the advances on the consignments. When he had £200 to the credit of his current account, they dishonoured his cheque for £199 10s., as they feared the security of the recent consignments was not sufficient to cover the amount of the acceptances taken up by them against the security. It was held that in the absence of express notice the defendants were not entitled to bring advances against consignments into the current account, and so to dishonour the cheque, and that it was properly left to the jury to say whether such notice had in fact been given.

A banker is under no obligation to let a customer overdraw, and if he does allow him to do so, he need give him no notice to put an end to the practice. (*Cumming* v. *Shand*, *supra*, at p. 132.) Another case on the effect of a course of practice is *Armfield* v. *London and Westminster Bank* (1883), 1 Cab. & E. 170. The plaintiff sued the defendant bank for dishonouring his bill: proved that he had no funds sufficient to meet it, save

by crediting as cash cheques paid in by him but not cleared: proved that the bank had always credited such cheques to him as cash: held that the bank could not as against him set up their discretion whether or not to treat such cheques as cash. As to what does and what does not amount to an implied agreement to allow an overdraft, see *Ritchie* v. *Clydesdale Bank* (1886), 13 Sess. Cas. 866, and *Fleming* v. *Bank of New Zealand* [1900], A.C. 577, where it was held that the deposit with the bank by the plaintiff's agent of a store warrant known to the bank to be subject to a pledge to the agent, was sufficient consideration for the bank's promise to honour the plaintiff's cheques drawn against the security of the deposit, in lieu of cash; it was also held that special damage from the dishonour of the cheques not having been alleged, evidence thereof, i.e. of the loss of credit and custom from particular individuals, was inadmissible.

Where the plaintiff deposited title-deeds with the defendant bank as security for an overdraft, and subsequently conveyed the property to another party as security, giving the bank notice, and owing the bank £365, it was held that the bank was justified in dishonouring the plaintiff's cheque for £70 drawn against a cheque for a like sum previously paid in, without notice to the plaintiff that he could not draw on his account, pending settlement of the overdraft, as the security was destroyed. But there was strong evidence that notice was given. (*Parkinson* v. *Wakefield*, 1889, 5 T.L.R. 646 C.A. confirming S.C., at p. 562.)

In *Twibell* v. *London Suburban Bank*, 1869, W.N.

127, it was held that when the plaintiff and his partner on opening their account stipulated with the defendant bank that no cheque drawn by one partner should be honoured unless initialled by the other partner, and the defendant bank in breach of this paid a cheque not so initialled by the plaintiff, the plaintiff could recover damages, and that the measure of damages was a moiety of the cheque so paid. In *Forman* v. *Bank of England*, the defendants were held liable, upon the findings of the special jury, for treating as a country cheque one drawn by the Norwich Union Life Insurance Society, and consequently not clearing it in London the day after payment in; whereby they dishonoured, the day after payment in, a cheque drawn against it, which would have been honoured had the Norwich cheque been treated as a London one. The jury found such cheques to be treated as London cheques and awarded £75 damages. (*g*) In *Holland* v. *Manchester and Liverpool District Banking Co., Ltd.*, the plaintiff drew on the defendants for £67 11s., his pass-book, in error, showing a balance of £70 17s. 9d., instead of £60 5s. 9d., the true balance. Alverstone, C.J., held that, pending the correction of the pass-book, the plaintiff was entitled to draw against the balance as therein stated, and he gave judgment for the plaintiff for £100 damages for dishonour of the cheque and costs.(*h*) *Frost* v. *London Joint Stock Bank, Ltd.*, was an action for libel, a perfectly good cheque of the

(*g*) (1902), 18 T.L.R. 339.

(*h*) (1909), 14 Com. Cas. 241. A special jury had assessed the damages, subject to the point of law.

plaintiff's, not presented by the defendants, collecting bankers, through oversight, being returned with a slip annexed, "Reason assigned—not stated". A verdict and judgment for £50 in plaintiff's favour were set aside on the ground that the plaintiff had not discharged the *onus* of proving the words libellous.(*i*)

A banker should, in the absence of any directions, pay cheques in the order of presentment. (*Kilsby* v. *Williams* (1822), 5 B. & Ald. 815; "Paget on Banking," p. 100; and *Sednaoui Zariffa Nahas & Co.* v. *Anglo-Austrian Bank;* "Times," 26 April, 1909; "Journal of the Institute of Bankers," xxx. 413.)

In the case of simultaneously presented cheques, if the balance be sufficient to pay either, but not both, one should be paid, and the practice is to pay the largest the customer's balance admits of. First mail cheques are to be preferred to cheques received through the midday clearing, and the latter to cheques subsequently tendered over the counter. ("Questions and Answers in Banking Practice," 6th ed., Nos. 408, 409.)

A paid cheque is the property of the drawer (*R.* v. *Watts* (1850), 2 Den. C.C. 14), but the banker may retain it as a voucher till his account is settled. (*Ib.*, at p. 21; and cf. *Charles* v. *Blackwell* (1877), 2 C.P.D., at p. 162.)

It is uncertain whether such a legal duty is imposed on a banker to keep secret the state of his customer's account as to make him liable for disclosure of it,

(*i*) (1906), 22 T.L.R. 760. Cf. *Szeck* v. *Lloyds Bank, Ltd.;* "Times," 15 January, 1908; "Journal of Institute of Bankers," xxix. 123.

without justifiable cause, in the absence of proof of special damage. The question was considered in *Hardy* v. *Veasey* (1868), L.R. 3 Ex. 107, where it was held that the question whether there was justifiable cause was properly left to the jury, who found that there was such a cause; the Court had consequently not to consider the main question. In *Foster* v. *Bank of London* (1862), 3 F. & F. 214, the plaintiff recovered the sum of £432, representing substantially the value of a bill accepted by him, payable at the defendant's. The defendants disclosed to the drawer, R., the sum by which the plaintiff's balance was insufficient to meet the bill, and R. paid that sum into plaintiff's credit and got the bill paid. Erle, C.J., agreed with the jury that the defendants should only have told R., "Not sufficient assets".

21.—A banker is not liable if he dishonour a cheque in any action by any person other than the drawer.

(See *Schroeder* v. *Central Bank of London* (1876), 34 L.T. 735; and *Bellamy* v. *Marjoribanks* (1852), 7 Ex. 389 at p. 404.)

This is not so in Scotland. By Scotch law presentment of a cheque gives the holder a lien on the drawer's balance at the bank.

22.—The relation of banker and customer is constituted where a person has funds in the hands of such banker, or is permitted by such banker to draw cheques upon him, or has an account with him, whether current or deposit, whether having at the time funds in such banker's hands or not (*j*), and (*k*) may be con-

(*j*) *Clarke* v. *London and County Bank* [1897], 1 Q.B. 552.
(*k*) Lord Brampton [1901], A.C., pp. 422, 423.

stituted where cheques are habitually lodged with a banker for presentation on behalf of the persons lodging them, so that when honoured the amount is credited and paid out to such person, whether with or without any profit to the banker for so presenting them.

The mere cashing across the counter of cheques, of which a person is the payee or holder, does not constitute such person the customer of the banker so cashing such cheques.

Nor does the collection of a single cheque for a stranger, whether in consideration of a commission or not. The collection of a cheque, with which a prospective customer opens an account, may perhaps be deemed to be on behalf of a customer. (*l*)

This is the law as laid down upon the construction of section 82 in *Matthews* v. *Williams, Brown & Co.* (1894), 10 T.L.R. 386; *Lacave* v. *Crédit Lyonnais* [1897], 1 Q.B. 148; *Great Western Railway Co.* v. *London and County Bank* [1901], A.C. 414.

In *Kleinwort* v. *Comptoir d'Escompte* [1894], 2 Q.B. 157, section 82 was not discussed, but the collection was for a stranger.

The authorities stop short of saying that a man must have an account at a bank to be a customer. See Lord Brampton [1901], A.C. at page 422; but Collins, J. [1897], 1 Q.B. at pages 154, 155, very nearly goes as far as that. Lord Davey [1901], A.C. at pages 420, 421, appeared to think there "must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer".

Probably a bank collecting a cheque for a person, who

(*l*) Cf. *Tate* v. *The Wilts and Dorset Bank* (1890); "Journal of the Institute of Bankers," xx. 376, *per* Darling, J.

was opening an account with it, would be deemed to be "collecting for a customer" within section 82. He would be a customer if the cheque were cleared. A deposit account qualifies a man as a customer, apart from any current account; *per* Lord Davey in *Great Western Railway Co.* v. *London and County Bank* [1901], A.C. at page 421.

23.—A banker who places a cheque to the credit of a particular customer as cash thereby becomes a holder in due course of such a cheque, and as such may sue all parties liable thereon, unless such cheque has been drawn not transferable or so made under section 8 (1), in which case the property therein does not pass to such banker.

Ex parte Richdale (1881), 19 Ch.D. 409; *M'Lean* v. *Clydesdale Bank* (1883), 9 A.C. 95; *National Bank* v. *Silke* [1891], 1 Q.B. 435; *Royal Bank of Scotland* v. *Tottenham* [1894], 2 Q.B. 715; *Bissell* v. *Fox* [1884], 51 L.T. N.S. 663 (*m*); *Great Western Railway Co.* v. *London and County Bank* [1901], A.C. 414; *London City and Midland Bank* v. *Gordon* [1903], A.C. 240.

If the view taken in *Ex parte Richdale* be correct, the banker becomes holder in due course whether the customer was overdrawn or not, and has no recourse against him, except on his indorsement.

The view taken by the Privy Council in *Gaden* v. *Newfoundland Savings Bank* [1899], A.C. 281, was that in such case the banker took only as the customer's agent for collection.

(*m*) Varied on appeal, but without reference to this point in 53 L.T. 193 (1885).

Ex parte Richdale and *Royal Bank of Scotland* v. *Tottenham* were cited in argument, but are not referred to in the judgment.

The facts were as follows :—

The appellant drew a cheque on the X. bank, whose servant initialled it. She then paid it into her deposit account at the respondents' savings bank, who credited it to her in her pass-book. The X. bank failed and dishonoured the cheque. The appellant contended that the respondents' bank took her cheque as holders, so that the loss fell on them. The Privy Council decided that, in the absence of express agreement, the respondents must be held to have taken the cheque as agents for collection only. It was also held that the only effect of a drawee bank initialling a cheque is to certify that it has funds of the drawer's sufficient to meet it.

In *Bavins, Junior* v. *London and S.W. Bank*, 5 Com. Cas. 1, it was said that the crediting a cheque as cash was not a payment of the amount to the customer, but was conditional on the cheque turning out all right, but the action was not between the banker and the customer who paid in the cheque, and so the observations were not a decision on the point.

In *Royal Bank of Scotland* v. *Tottenham* the bank permitted the customer to draw against a cheque for £250 paid in by her. When it was dishonoured, she became a debtor to the bank for £137, the amount which she drew against the cheque. Her cash balance, when she paid in the cheque, was practically nil. Here clearly the bank took the cheque as holders and could sue the drawer. In

M'Lean v. *Clydesdale Bank* the cheque paid in by the customer was applied by the bank in reduction of his overdraft.

In *National Bank* v. *Silke* the cheque was credited to an overdrawn customer. This wiped out his overdraft and placed him in funds. He at once drew against the cheque, before it was presented, and when it was dishonoured his balance was very small. In deciding that here, as in M'Lean's case, the bank took as holders, Bowen, L.J., said (1891, 1 Q.B. at p. 439): "The case of *M'Lean* v. *Clydesdale Bank* makes it clear . . . that if a cheque is paid to a bank on a footing that the amount may be at once drawn upon, and it is drawn upon accordingly, the bank is a holder for value in due course".

The effect of Gordon's cases and of the Crossed Cheques Act (1906), will be considered in Chapter V.

Woodland v. *Fear* (1857), 7 El. & Bl. 519, decided that where the Y. branch of a bank cashed a cheque drawn on the X. branch, in ignorance of the state of the drawer's account there, and at the date of Y. branch cashing it the X. branch had funds enough of the drawer's to meet it, but on presentment to the X. branch the cheque was dishonoured for lack of funds, the Y. branch could sue the person to whom it gave cash for the cheque, as for money had and received, on the ground of failure of consideration. The branches were entitled to be regarded as separate parties. But where a party has an account at two branches of a bank, one showing a credit and the other a debt, the bank can combine the accounts and charge the credit account with the debt of the other. (*Garnett* v. *M'Kewan* (1872), L.R. 8 Ex. 10.)

CAPACITY OF PARTIES.

24.—Capacity to incur liability as a party to a cheque is co-extensive with capacity to contract.

A corporation cannot make itself liable as drawer (?) or indorser of a cheque unless it is competent to do so by the law for the time being in force relating to corporations (?).

Where a cheque is drawn or indorsed by an infant or corporation (?) having no capacity or power to incur liability on a cheque, the drawing or indorsement entitles the holder to receive payment of the cheque and to enforce it against any other party thereto. (Section 22.)

As regards corporations, the liability of a corporation as drawer, at any rate, of a cheque would appear to be governed by whether the contract in respect of which it was given was enforceable against the corporation or not.

It is uncertain how far section 22 (1) applies to cheques. A corporation may be competent to contract, but not to draw bills; but we cannot conceive it as having capacity to contract and yet not to draw cheques. Can it be liable to a holder of a cheque on the instrument, or is it liable only to its immediate obligee on the consideration? Sir M. Chalmers ("Bills," 7th ed., p. 70) asks: "Query, if the rule as to drawing bills or making notes (by corporations) applies to cheques?" Sir J. Paget ("Banking," p. 17) observes: "It can hardly be suggested that a railway or gas company, both of which are technically non-trading, is constrained to pay all its outgoings in notes or cash". *Serrell* v. *Derbyshire Railway Co.* (1850), 9 C.B. 81 (*n*),

(*n*) In this case a company was held not liable on cheques drawn by its directors, properly sealed, but not drawn by the directors as such,

and *Bateman* v. *Mid-Wales Railway Co.* (1866), L.R. 1 C.P., at page 506, seem to recognize a distinction between bills and cheques in this respect.

The indorsement of a corporation by section 22 (2) passes the property in a cheque, though from want of capacity the corporation may not be liable. (So, before the Act, *Smith* v. *Johnson* (1858), 3 H. & N. 222, 27 L.J. Ex. 363.) Bankers may justifiably pay cheques drawn by companies, where, by the form of such cheques, the companies would not be liable as drawers, if the cheques had not been paid; provided that in the drawing of such cheques the requirements of the articles of association had apparently been complied with. This is following the rule in *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327. (*Mahony* v. *East Holyford Co.* (1875), L.R. 7 H.L. 869 and 884.)

Section 91 (2) of the Act provides: "In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

"But nothing in this section shall be construed as requiring any bill or note of a corporation to be under seal."

By the Infants' Relief Act, 37 & 38 Vict. c. 62, it is provided that:—

Section 1.—"All contracts, whether by specialty or simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods

nor appearing on the face of them to have been drawn on behalf of the company.

supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which any infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

Section 2.—"No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Thus an infant is not liable as drawer or indorser of a cheque, though he may be liable on the consideration, as if he gave it for necessaries. (*o*) And he may not be made bankrupt on a cheque or bill, though given as the price of necessaries. His liability is on the consideration, not on the instrument. (*In re Soltykoff* [1891], 1 Q.B. 413.)

By section 2 he would not be liable to a holder with notice on a cheque signed after majority in consideration of a debt contracted before majority, or in ratification of a promise to repay made when an infant. (*Smith* v. *King* [1892], 2 Q.B. 543.) But if he gave a cheque after majority, he would be liable to a *holder in due course*,

(*o*) "The person who has supplied an infant with necessaries can always sue on that contract for the price of what he has supplied." (Esher, M.R. [1891], 1 Q.B., at p. 415.)

notwithstanding that he gave it in respect of a debt or promise contracted or made as an infant. (Cf. *Belfast Banking Co.* v. *Doherty* (1879), 4 Ir. L.R. Q.B.D. 124.)

In *Ex parte Kibble* (1875), L.R. 10 Ch. 373, an infant drew a bill payable six months after date. It was thus payable three months after he came of age. On majority he allowed judgment to go against him by default, at the suit of the payee. His so doing was held to be a ratification of the bill, and the judgment debt was held to be bad as a petitioning creditor's debt, the ratification being void. We conclude if he had signed a cheque as an infant, post-dated so as to be payable after majority, and could have proved that he signed it when an infant, he would be not liable upon it. An infant's indorsement, by section 22 (2), passes the property in a cheque, though he be not liable upon it, and it is immaterial that the cheque is post-dated, though this point was raised in *Royal Bank of Scotland* v. *Tottenham*, before Wills, J. ([1894], 2 Q.B. 715, on appeal only).

An infant is not estopped from disputing his liability on his cheque (bill or note), given for an advance of money, on the ground that when he gave it and received the consideration, he falsely represented himself to be of full age. (*Levene* v. *Brougham*, 1909, 25 T.L.R. 265 C.A. See also *Bartlett* v. *Wells* (1862), 1 B. & S. 836.) In *Bateman* v. *Kingston* (1880), 6 Ir. L.R. C.L. 328, the infant represented himself to be of age, and the money was advanced for necessaries, but the plaintiff failed to recover, as the notes he sued on bore interest at 20 per cent. On a bill not carrying interest and for neces-

saries, the Court thought it might be different. An acceptor of full age was held liable on a bill *drawn* when he was an infant. (*Stevens* v. *Jackson* (1815), 4 Camp. 164.) No filling up after he is of age, and without his authority, of a bill signed in blank by a person, when an infant, will, it is conceived, bind him. (Cf. *Hunt* v. *Massey* (1834), 4 B. & Ad. 902.)

The question of current accounts with a minor is examined in Chapter II of Sir J. Paget's "Banking". He concludes that a banker is fully entitled to the protection of sections 60 and 81, where the drawer is an infant; that a banker obtains a valid discharge, when paying an infant's cheque; that a holder has, by section 22 (2) a right to receive the money on a cheque drawn by an infant but that overdrafts to an infant are irrecoverable by the banker. (Cf. *Nottingham Permanent Benefit Building Society* v. *Thurstan* [1903], A.C. 6.)

The effect of the Married Women's Property Act, 1893, section 2, is to place married women on the same footing as single women in respect of liability on cheques, to which they became parties since the Act came into operation. Insanity is no defence to an action on a cheque by a holder in due course. The party sued must prove that the plaintiff had notice of it. (Cf. *Imperial Loan Co.* v. *Stone* [1892], 1 Q.B. 599.)

Principal and Agent.

25.—No person is liable as drawer or indorser of a cheque who has not signed it as such; provided that:—

(1) Where a person signs a cheque in a trade or assumed name, he is liable thereon as if he had signed it in his own name.

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm. (Section 23.)

A partner in a non-trading firm is not presumed to have any authority to bind the firm by drawing bills in the firm's name.

A cheque post-dated a week was drawn by a partner in the name of a firm of solicitors as security for a private loan. Held it was a bill at seven days and did not bind the firm. (*Forster* v. *Mackreth* (1867), 36 L.J. Ex. 94.)

As regards ordinary cheques in a firm's name, whether the firm were a trading firm or not, a holder could sue the firm, whether the cheques were drawn on its behalf or by a fraudulent partner for his own purposes. Only positive knowledge of the facts would disentitle a holder to recover.

26.—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority. (Section 25.)

Such a signature is in the principal's name, followed by "p.p.," or "*per pro.*," and the agent's name.

A bank paying on a forged or unauthorized indorsement "*per pro.*" may be protected by section 60. (Cf. *Charles* v. *Blackwell* (1877), 2 C.P.D. 151, at pp. 159, 160.)

If an agent draws a cheque "*per pro.*" in excess of his authority, his principal is not liable thereon to a person who has cashed the cheque in good faith, but he is liable

to him for any proceeds that have come into his possession or been expended on his behalf. (*Reid* v. *Rigby* [1894], 2 Q.B. 40.) In *Morison* v. *Kemp* (1912), 29 T.L.R. 70, the plaintiffs were held entitled to recover from the defendant the value of certain cheques, drawn by A. "p.p." the plaintiffs, insurance brokers, and given to the defendant in respect of bets on horse races. A. was plaintiffs' manager. Darling, J., held that it was not necessary to show that defendant knew A. was acting outside his authority. In *Morison* v. *London County and Westminster Bank* (1913, 57 S.J. 427) this view was approved—viz.: that section 25 makes a principal to recover money paid on cheques signed *per pro.* in excess of authority. The collection of cheques indorsed *per pro.* without inquiry is evidence of negligence, which may deprive a banker of the protection of section 82. (See *post*, pp. 66, 106.)

See also *National Bank of Scotland* v. *Dewhurst* (1896), 1 Com. Cas. 318.

27.—Where a person signs a cheque as drawer or indorser and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (Section 26 (1).)

It is further provided by section 26 (2):—

"In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted".

In *Landes* v. *Marcus* (1909), 25 T.L.R. 478, the plaintiff sued the defendant upon a crossed cheque in the following form: it was stamped at the top with the words "B. Marcus & Co. (Ltd.)," and signed "B. Marcus, director, S. H. Davids, director, —— (blank), secretary". Plaintiff's counsel relied on sections 26 and 55 of the Act, and on *Dutton* v. *Marsh* (1871), L.R. 6 Q.B. 361. The defendant's counsel cited *Alexander* v. *Sizer* (1869), L.R. 4 Ex. 102; *Chapman* v. *Smethurst* (1909), 25 T.L.R. 383; *Lindus* v. *Melrose* (1857), 27 L.J. Ex. 326, and *Dermatine Co.* v. *Ashworth* (1905), 21 T.L.R. 510. On the authority of *Dutton* v. *Marsh*, Jelf, J., gave judgment for the plaintiff, holding the defendant and not the company liable. This decision met with great disfavour in commercial circles. In *Lindus* v. *Melrose* (*supra*), a note in this form: "Three months after date we promise to pay F. S. or order £600 . . . on account of the X.Y. Co., Ltd.,

(Sd.) S. M.
H. W. } Directors.
J. H.

E. G. (Secretary),"

was held to bind the company and not the directors. The liability of directors or company on cheques signed by directors on behalf of the company turns largely on statutory provisions. The material sections are section 77 of the Companies (Consolidation Act), 1908, substantially re-enacting section 47 of the Act of 1862, and section 63 of the same Act of 1908, re-enacting sections 41 and 42 of the former Act.

Section 77 provides that "a bill of exchange . . . shall

be deemed to have been made, accepted or indorsed, on behalf of a company, if made, accepted or indorsed in the name of, or by or on behalf of or on account of, the company by any person, acting under its authority". By section 63, every limited company shall "have its name mentioned . . . in all bills of exchange, promissory notes, indorsements, cheques, and orders for money. . . ." Any director, manager, or officer, who signs or authorizes to be signed any bill, note, indorsement, or cheque, or order for money of the company, wherein its name is not mentioned, is liable to a fine of £50 and "shall further be personally liable" on such bill, note, cheque, etc. On section 47 of the Act of 1862, a note, "I promise to pay . . . (sd.) J. H. S.'s Laundry and Dye Works Limited, J. H. S., managing director," was held to be the personal note of J. H. S. (*Chapman* v. *Smethurst* [1909], A.C. 73.) In *Nassau Steam Press* v. *Tyler* (1894), 70 L.T. 376, on sections 41 and 42 of the Act of 1862, the real name of the company was "The Bastille Syndicate Limited". A bill, purporting to be accepted on behalf of "Old Paris and Bastille Syndicate, Limited," was held to bind the directors personally. In *Dermatine Company* (*Limited*) v. *Ashworth* (*supra*), a bill correctly addressed to the M. (drawee) Company, Limited, was stamped on behalf of the company with a stamp longer than the bill; consequently the word "Limited" did not appear as part of the acceptance; yet the directors were held not liable, *per* Channell, J. "Ltd." may be written for "Limited," and it suffices if "the name" is "mentioned" on the cheque; it need not form part of the drawing. (Cf. *F. Stacey & Co.* v. *Wallis*, 1912, 106 L.T. 544.)

CHAPTER III.

ISSUE—NEGOTIATION—NON-TRANSFERABLE CHEQUES—RESTRICTIVE INDORSEMENT — NEGOTIATION WITHOUT INDORSEMENT — "ORDER" AND "BEARER"—TRANSFER BY DELIVERY WITHOUT INDORSEMENT—LOST CHEQUES.

28.—Issue means the first delivery of a cheque, complete in form, to a person who takes it as a holder. (Section 2.)

In *Clutton* v. *Attenborough* [1897], A.C. 90, the plaintiff signed cheques payable to "G. B.," a fictitious person who was fraudulently represented by the plaintiff's clerk to be a real person, who had done work for the plaintiff. The clerk indorsed the cheques "G. B." and negotiated them for his own purposes. Held that the cheques were "issued" within section 2. The case was treated as exactly covered by *Vagliano's Case* [1891], A.C. 107.

The contention of Tindal Atkinson, Q.C., was that the cheques were never "issued" by Clutton, inasmuch as there was no "first delivery" of them to a "person who took them as holder," for the fraudulent clerk P. could not be said to take them as holder; the delivery to P. was "conditional and for a special purpose only" (section 21 (2) (b)), namely to pay the person G. B., supposed by Clutton to be his actual creditor; but this argument was unavailing against Attenborough, who was a holder in

due course, and it appears to us that section 21 (2) (b) in itself contains an answer to the argument, "But if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed". Can a cheque be "issued" to an immediate party—a payee? It would seem so, as "holder" by section 2 includes "payee"; yet in *Talbot* v. *Von Boris* [1911], 1 K.B. 854, the Court held section 30 (2) not to apply to a payee, as if "issue" (especially therein mentioned as distinct from "subsequent negotiation") to such a "holder" as a payee was not within the purview of the section. Cf. *post*, p. 52.

Section 28 must be construed with reference to section 20 of the Act, set out as section 52 herein.

It is stated in *Ingham* v. *Primrose* (1859), 7 C.B. N.S. 82, to be settled law that the drawer of a "bearer" cheque might be liable to a holder in due course, though the drawer had never issued it, it being stolen before issue.

But the authority of this case has been recently doubted. (*Per* Vaughan Williams, J., in *Smith* v. *Prosser* [1907], 2 K.B. at p. 746, and was earlier by Brett, L.J., in *Baxendale* v. *Bennett*, 1878, 3 Q.B.D. at p. 532.) Byles, J., was a member of the Court in *Ingham* v. *Primrose.*

29.—A cheque is negotiated when it is transferred from one person to another in such a way as to constitute the transferee the holder of the cheque. A cheque payable to bearer (*a*) is negotiated by delivery.

(*a*) See section 13, Chapter II, for the explanation of "bearer" and "order".

A cheque payable to order is negotiated by the indorsement of the holder (*b*), completed by delivery.

Where the holder of a cheque payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the tranferor had in the cheque, and the transferee in addition acquires the right to have the indorsement of the transferor. (Section 31 (4).)

"Negotiate" as thus defined means simply "transfer," and a cheque may be "negotiated" which is "not negotiable". A negotiation only makes the transferee the holder; it does not make him the holder in due course.

It was settled in *Whistler* v. *Forster* (1863), 14 C.B. N.S. 248, that a *bonâ fide* transferee for value, who did not see that his transferor indorsed the cheque, was not entitled to recover against a party from whom the transferor had obtained the cheque by fraud.

A simple signature on a cheque is a sufficient indorsement. An indorsement must be of the entire cheque, i.e., of the whole sum payable, or else it does not operate as a negotiation of the cheque. (Section 32.)

The distinction between special indorsement and indorsement in blank has been explained in section 18.

By section 37 of the Act it is provided that "where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, reissue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable". (See *Jenkins* v. *Coomber* [1898], 2 Q.B. 168,

(*b*) See *Marston* v. *Allen* (1841), 8 M. & W. 494.

and *Shaw & Co., Limited* v. *Holland and Neal* (1913), 29 T.L.R. 341.)

30.—Where a cheque contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable. (Section 8 (1).)

It was assumed in *National Bank* v. *Silke* [1891], 1 Q.B. 435, that a cheque might be made not transferable under this subsection, read with section 73.

That case decided that a crossing, "Account of J. F. M., National Bank, Dublin," does not amount to "words prohibiting transfer"; consequently J. F. M.'s banker, as holder in due course, could sue the drawer, although as between J. F. N. and the drawer the consideration had wholly failed. The cheque was an "order" one, and Lindley and Fry, L.JJ., doubted if "order" or "bearer" cheques could be made not transferable under section 8 (1). Fry, L.J., at page 439 says that the section divides bills into three classes: bills not negotiable, bills payable to order, and bills payable to bearer. The latter two classes must always therefore be "negotiable," in the sense of "transferable". The word "negotiable" in this section and in the marginal note is used to mean transferable. A bill may be restrictively indorsed so as to be not "negotiable" in the more technical sense and yet be transferable. (Section 36 (2).) So also a cheque crossed "not negotiable" is freely transferable. This confusion of language, which occurs not only in section 8 but elsewhere in the Act, led Lindley, L.J., to doubt whether a

cheque could be made "not negotiable" under section 8 or otherwise than under sections 76-82. In other words, he doubted whether a cheque could be made "not *transferable*" at all. It is submitted that this doubt was not well founded. Section 73 leaves section 8 applicable to cheques. Section 81 provides for making a cheque "negotiable subject to equities," if we may use a phrase intelligible to all lawyers, but not for making a cheque "not negotiable" in the sense of "not transferable". An order on the face of the cheque similar to that on the back of a bill restrictively indorsed would have the effect of making it not transferable. To draw a non-transferable cheque, Sir J. Paget ("Banking," 53) suggests that the word "order" or "bearer" be struck out and the alteration initialled and the cheque be drawn payable to "A. B. only," and the words "not transferable" be written horizontally on the instrument. In practice, however, such cheques will never be used. On presentment over the counter, the banker would require the attendance of a person known to him to identify the payee, and even then would be wise to require an indemnity from the drawer before paying such cheques. The adoption of such cheques would so greatly encumber banking business, that the question may be regarded as rather academic, than practical. Deleting the words "or order" and writing, "Pay K. against cheque" (i.e., K.'s cheque delivered by way of security) have no effect to restrict transfer or negotiation within section 8, and do not amount to a "condition" within section 3. (*Glen* v. *Semple* (1901), 3 F. Sess. Cas. 1134.)

31.—When a cheque is payable to the order of two or more payees or indorsees, who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. (Section 32 (3).)

If a cheque is payable to "C. and D. or to the order of either of them," the indorsement of either is thereby rendered sufficient. (Cf. *Watson* v. *Evans* (1863), 32 L.J. Ex. 137, a case on a note payable to three payees.)

32.—Where in a cheque payable to order the payee or indorsee is wrongly designated or his name is misspelt, he may indorse the cheque as therein described, adding, if he think fit, his proper signature. (Section 32 (4).)

This is useful, as it would often be very inconvenient to return the cheque to drawer.

33.—An indorsement is restrictive which prohibits the further negotiation of the cheque, or which expresses that it is a mere authority to deal with the cheque as thereby directed, and not to transfer the ownership thereof, as, for example, if a cheque be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection". (Section 35 (1).)

34.—A restrictive indorsement gives the indorsee the right to receive the payment of the cheque, and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorser unless it expressly authorizes him to do so. (Section 35 (2).)

The reader should distinguish the effects of restrictive indorsement and crossing "not negotiable". A cheque crossed "not negotiable" is still transferable, but a cheque restrictively indorsed is not even transferable, unless the indorsement expressly authorizes further transfer.

35.—Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the cheque with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement. (Section 35 (3).)

I.e., it becomes "not negotiable".

36.—Where a holder of cheque payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery".

A transferor by delivery is not liable on the instrument.

A transferor by delivery who negotiates a cheque thereby warrants to his immediate transferee, being a holder for value, that the cheque is what it purports to be; that he has a right to transfer it; and that at the time of transfer he is not aware of any fact which renders it valueless. (Section 58.)

See for examples *Jones* v. *Ryde* (1814), 5 Taunt. 488, and *Gurney* v. *Womersley* (1854), 24 L.J. Q.B. 41.

37.—The contract entered into by the drawer and indorser of a cheque, in drawing and indorsing, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) In order to be effectual, must be made either by or under the authority of the party drawing, or indorsing, as the case may be.

(b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring property in the cheque.

But if the cheque be in the hands of a holder in due course, a valid delivery of the cheque by all parties prior to him, so as to make them liable to him, is conclusively presumed.

Where a cheque is no longer in possession of a party who

has signed it as drawer or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved. (Section 21.)

In *Baxendale* v. *Bennett* (1878), 3 Q.B.D. 525, an incomplete bill was stolen after B. had accepted it in blank. B. had sent it to C. for C. to sign as drawer. C. returned it unsigned, and B. put the blank acceptance into his drawer, whence it was stolen, filled up and negotiated to the plaintiff. B. was held not liable upon his acceptance. His name was not put upon a bill, but only upon an inchoate instrument, and, as we shall see, "in order that any such instrument, when completed, may be enforceable against any person who became a party thereto prior to its completion, it must be filled up . . . strictly in accordance with the authority given". (Section 52, embodying section 20 of the Act.) The instrument in this case was not so filled up, and B. was not liable.

Ingham v. *Primrose* (1859), 7 C.B. N.S. 82, was a case where an acceptor of a bill which had a drawer's name (Murgatroyd's) thereto, and was a complete bill, tore it up, as the drawer told him he could not get it discounted. The drawer, in his presence, picked it up and subsequently pasted it together and negotiated it, its appearance not suggesting cancellation. The acceptor was held liable to a holder, who made title through a holder in due course. He had put his name to it as a complete instrument. This case has lately been doubted. (See *ante*, p. 36, and *contra*, 1900, 2 Q.B., at p. 89.)

Sir M. Chalmers suggests from the dictum of Williams,

J., at page 85, that if A. drew a cheque payable to bearer, intending to pay it to X., and it was stolen from his desk before he issued it, he would be liable to a holder in due course (p. 60).

On the wording of section 21 (2) (b), this view seems correct. Moreover section 63 (1) only provides that intentional cancellation by the holder (if Primrose was a holder) shall discharge the bill, where "the cancellation is apparent thereon," and the Court found as a fact that this bill did not appear to be cancelled. The jury had found that the will had been torn *animo cancellandi*.

Baxendale v. *Bennett* and *Ingham* v. *Primrose* are reconcilable decisions.

In *Baxendale* v. *Bennett* the instrument was stolen before it was complete.

It was never "delivered by the signer in order that it might be converted into a bill". In *Ingham* v. *Primrose* the bill was complete when it was torn up, and so "a valid delivery" by the drawer was "conclusively presumed" so as to make him liable.

This, it is submitted, is the real distinction between the two cases. Bramwell, L.J., in *Baxendale* v. *Bennett* points out that in *Ingham* v. *Primrose* the instrument was not stolen, and in the case before him it was. In *Ingham* v. *Primrose* "the defendant voluntarily parted with the instrument". Here it was only obtained from him by the commission of a crime (p. 530). Brett, J., simply does not agree with *Ingham* v. *Primrose* (pp. 532, 533). Neither judge distinguishes the cases on the ground that the bill in *Ingham* v. *Primrose* was a com-

plete bill, with a drawer's signature, while that in *Baxendale* v. *Bennett* was an inchoate instrument, not drawn at all. (Cf. *Stoessiger* v. *South-Eastern Railway* (1854), 3 E. & B. 549.)

The case of *Clutton* v. *Attenborough* [1897], A.C. 90, is directly in point. The plaintiff drew cheques to the order of G. B., a fictitious person, represented by his clerk to be the plaintiff's creditor. He gave them to the clerk to pay to G. B. It was held that he could not set up against a holder in due course that there had been no "first delivery" of the cheques to any person who took them as holder.

Section 21 (3) may be illustrated by *Marston* v. *Allen* (1841), 8 M. & W. 494. It was there held that a party sued on a bill may show that the indorser never delivered it so as to negotiate it, for there must be delivery and indorsement of a bill payable to order. (Section 31 (3).) "A valid and unconditional delivery is presumed until the contrary is proved." (Section 21 (3).) When the contrary is proved, the burden of proving himself a holder in due course is shifted to the person relying on the instrument. It was held that evidence ought to have been admitted that there was no delivery of the bill in question so as to negotiate it, and that the plaintiff was aware of it, for on such evidence the jury would have found for the defendant. A jury may infer a delivery by A. to B. where A. has delivered a cheque to C. to get it discounted, and C. has not disclosed B.'s identity to A. (*Samuel* v. *Green* (1847), 10 Q.B. 262.)

Lost Cheques.

Section 69 of the Act provides as follows:—

"Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

"If the drawer, on request as aforesaid, refuses to give such duplicate bill (*c*), he may be compelled to do so."

The words "before it is overdue" would hardly seem to apply to cheques. Section 74 provides what is the position of the drawer when a cheque is overdue. He is not discharged, like the drawer of a bill, but only to the extent to which he is a creditor of the bank to a larger amount than he would have been had the cheque been presented within a reasonable time. (See section 45 (2).) Moreover a cheque does not become "overdue" at any stated time. It is a question of fact. Further, if it be overdue, it is not negotiable and the object of requiring an indemnity has practically ceased to exist. If a not negotiable, or more strictly, a non-transferable bill be lost, the holder may, at common law, require a duplicate without furnishing an indemnity. (*Wain* v. *Bailey*, 1839, 10 Ad. & E. 616, a note promising to pay A. B. only.)

Section 69 gives no power to obtain an indorsement over again, or, in the case of a bill, the acceptance.

(*c*) See *Rhodes* v. *Morse* (1850), 14 Jur. 800; *Taylor* v. *Scrivens*, Beav., 1839, 571, under the former Act, 9 & 10 Will. III, c. 17.

Section 70 of the Act provides that—

"In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question."

In *Norman* v. *Ricketts* (1886), 3 T.L.R. 182, the plaintiff wrote to the defendant for the "favour of a cheque". The defendant sent an open cheque, which was stolen in the post and cashed by the thief. The Court of Appeal held the plaintiff's letter to be an invitation to send the cheque by post; and that posting was equivalent to payment; judgment for defendant upheld. An earlier case was *Warwick* v. *Noakes* (1820), 1 Peake 98, where payment was by bill.

In *Pennington* v. *Crossley & Sons, Ltd.* (1897), 77 L.T. 43, plaintiff sued for £509 as the price of wool sold and delivered to defendant. Defendant gave evidence that for twenty years he had always sent cheques per post to the plaintiff. On this occasion he had sent a cheque with a blank receipt form to be filled up by the plaintiff. The cheque, which was crossed, was stolen in the post, the thief forging plaintiff's indorsement and getting the cheque collected. The defendant contended that the course of business showed that payment was to be made by posting cheques, and that posting was equivalent to payment. The Court of Appeal, distinguishing the earlier cases on the ground that in each there had been an express invitation to use the post, reversing Grantham, J.,

declined to take this view. Judgment for plaintiff. (*d*) From the report in 13 T.L.R. 513, it appears that the cheque was crossed generally. The thief used it to open an account at another bank.

In *Baker* v. *Lipton* (1899), judgment was given for the plaintiff, suing for the value of a cheque lost in the post, there having been no invitation to use the post in making payment.

In *Thairlwall* v. *G. N. Railway Co.* (1910), 2 K.B., at pages 515, 518-9, it was held that a dividend warrant not to be paid after three months from date of issue unless countersigned by the secretary of the company, was a "cheque" within the Act; that the plaintiff had agreed to accept payment by post, in virtue of a general resolution of stockholders, confirming the report as to payment of dividends, and was not entitled to a duplicate warrant, without giving an indemnity, as required by section 69, the posting being equivalent to payment.

Where A. delivered a cheque to B., and it was lost in transmission to C.'s agent, and A. promised to give C. another, it was held C. could not enforce the promise for want of consideration, and had no right to demand another cheque in the absence of sufficient proof that B. was his agent. (*Johns* v. *Mason*, 1851, 20 L.J.Ch. 305.)

(*d*) In this case several authorities were cited as to the effect of posting as binding a contract. That class of case is familiar enough, but in this special connexion, everything turns on whether there was an invitation to use the post; if there was, the sender of a cheque by post must, it is suggested, meticulously observe the terms of the invitation as to the mode of drawing and crossing the cheque, and may always safely add "Not negotiable" to the crossing.

Where the L. bank lost a cheque sent it by T., the drawer, for the credit of A.'s account, and the bank credited the account with the value of the missing cheque, and took T.'s undertaking, against an indemnity, to forward another cheque, it was held that the bank could not sue T. for money paid or on an account stated, though it might have maintained *assumpsit*. Possibly, after crediting A.'s account, the bank would now be "a holder" within section 69. (*Lubbock* v. *Tribe*, 1838, 3 M. & W. 607.)

A question may arise, where a cheque is lost by the holder and he so advises the drawee bank, which, nevertheless, pays the cheque, in the absence of a stop order from the drawer, whether such payment is in good faith and in the ordinary course of business, so as to be a valid payment by the banker. In the Australian case of *Colonial Bank of Australasia* v. *Hunter* (1862), 1 W. & W. 236, the appellants succeeded in their appeal in these circumstances. Respondent on 23 April, 1862, the two previous days not being business days, advised appellants of the loss by him of a bearer cheque on their bank, and stated that whoever had got possession of it must have done so wrongfully. The cheque was brought to the bank on the following day by a customer and credited to his account, the bank disregarding the respondent's notice, as no notice to stop had been received from the drawer. The Court, reversing the Judge below, entered judgment for the bank, the respondent having recovered the value of the cheque in the lower Court. This decision accords with English views and practice. But had the cheque

been an "order" one and been lost before indorsement, it may well be asked if the bank would be entitled to the protection of section 60, if the true owner gave satisfactory particulars of how he became possessed of the cheque and how he lost it. The risk of liability in damages to the drawer by marking the cheque "Present again," when the wrongful possessor presented it, would be slight, and it might conceivably be unreasonable to expect a prompt stop order from the drawer if, for instance, he were travelling, or at sea, or had met with an accident. A case might well arise, in which to pay the party presenting, or to pay the collecting bank, would be negligent and not in the ordinary course of business, so as to deprive the banker of the protection of section 60, or of section 80, as the case might be.

Sir John Paget says, writing of such a case as supposed: "If those statements (i.e. as to loss of cheque and forgery of anything purporting to be an indorsement) were true, and the bank paid the cheque when so presented, they would have to show, as against the payee, that the payment was in good faith and in the ordinary course of business." ("Banking," 125, 126.)

Stawell, C.J., asked, in *Colonial Bank* v. *Hunter* (*supra*): "If the bank had dishonoured the cheque and the original drawer had sued them, what defence would the bank have had?" The answer is that the cheque being dishonoured at the payee's request, the drawer would not have sustained that damage to his credit, which arises in other cases, and is the foundation of his claim for damages.

CHAPTER IV.

CONSIDERATION—A HOLDER DEEMED TO BE FOR VALUE—BURDEN OF PROOF—FRAUD, ILLEGALITY AND DURESS—IMPEACHMENT OF CONSIDERATION—GAMING.

38.—Valuable consideration for a cheque may be constituted by (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. (Section 27 (1).)

Currie v. *Misa* (1875), L.R. 10 Ex. 153—Ex.Ch.; *McLean* v. *Clydesdale Bank* (1883), 9 A.C. 95.

A tradesman, not willing to cash a cheque for a customer, agrees to collect it. On hearing from his banker that it is cleared, he pays over its amount, and is sued by the "true owner," the customer having no title. Has he given "valuable consideration," so as to afford him a defence? A learned County Court Judge has held not, *sed quære*.

39.—Where value has at any time been given for a cheque, the holder is to be deemed to be a holder for value as regards all parties to the cheque who became parties prior to such time (*a*). (Section 27 (2).)

40.—Where the holder of a cheque has a lien on it, arising either from contract or by implication of law, he is deemed to

(*a*) I.e., it lies on any prior parties who may be sued to show the holder was not a holder for value, nor a transferee from one. Both averments must be proved. See *Bosanquet* v. *Corser* (1841), 8 M. & W. 142, at p. 144; *Watson* v. *Russell* (1864), 5 B. & S. 968.

be a holder for value to the extent of the sum for which he has a lien. (Section 27 (3).)

41.—Every party whose signature appears on a cheque is primâ facie deemed to have become a party thereto for value. (Section 30 (1).)

42.—A banker becomes a holder for value of a cheque by placing the amount of the cheque, before it is cleared, to the credit of a customer, who has handed him such cheque to be placed to his credit, whether the cheque be payable to "order" or to "bearer," and whether the said customer's account be overdrawn at the time of such placing to his credit or not.

This is the effect of *Ex parte Richdale* (1882), 19 Ch.D. 409, confirmed by *Royal Bank of Scotland* v. *Tottenham* [1894], 2 Q.B. 715, and other cases; but in *Gaden* v. *Newfoundland Savings Bank* [1899], A.C. 281, the Privy Council held that when the account was not overdrawn the bank took a bearer cheque as agent for collection only. But the proposition of law contained in section 42 is hardly open to question, in view of the stream of authorities supporting it.

The matter will be recurred to in treating of section 82 of the Act, in Chapter V.

43.—Every holder of a cheque is primâ facie deemed to be a holder in due course, but if, in an action on a cheque, it is admitted or proved that the issue or subsequent negotiation of the cheque is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the cheque. (Section 30 (2).)

See definition of "holder in due course" in section 8, Chapter II.

The words "or proved" merely mean "if there is evidence to go to a jury". (*Tatam* v. *Haslar* (1889), 23 Q.B.D. 345, at pp. 348, 349.)

It has been held by the Court of Appeal that section 30 (2) does not apply where "the holder" is the person to whom the instrument was originally delivered, i.e. the payee, but only as against subsequent transferees. Accordingly where a wife gave evidence that she made a note under duress from her husband, the payee recovered from her, without going into the box to prove his good faith. (*b*)

44.—A holder (whether for value or not) who derives his title to a cheque through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of a holder in due course as regards all parties to the cheque prior to that holder. (Section 29 (3).)

See *May* v. *Chapman* (1847), 16 M. & W. 355, where a defence that A. had obtained a bill by fraud from the defendant and had indorsed it to B., who indorsed it to the plaintiff, and that the plaintiff was aware of A.'s fraud, was held bad, as it was not also pleaded that B. was aware of the fraud.

(*b*) *Talbot* v. *Von Boris* [1911], A.C. 854. Here the wife, by her own evidence, exonerated the plaintiff from knowledge of the duress. The decision of the Court is not, perhaps, above criticism. "Duress" in the *issue*, the case here, is admittedly within section 30 (2); and section 2 expressly defines "holder" to include "payee". Cf. Fletcher Moulton, L.J., in *Lloyd's Bank, Ltd.* v. *Cooke* [1907], 1 K.B. at p. 807. Where the holder is the payee, the giving of value may perfectly well follow the act of duress or fraud as between other immediate parties—joint makers, or drawer and acceptor.

The following rules as to impeachment of consideration are stated and illustrated in Chalmers, pages 104-12.

1. Any defence available against an immediate party is available against a remote party who is in privity with such immediate party.

2. Mere absence of consideration, total or partial, is a defence against an immediate party or a remote party who is not a holder for value, but it is not a defence against a remote party who is a holder for value.

3. Total failure of consideration is a defence against an immediate party, but it is not a defence against a remote party who is a holder in due course.

4. Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained or liquidated amount, but not otherwise. It is not a defence against a remote party who is a holder for value.

5. Fraud is a defence against an immediate party and against a remote party who is not a holder in due course.

6. Illegality of consideration, total or partial, is a defence against an immediate party, but not against a holder in due course.

7. When a bill is given for a consideration which by statute expressly makes it void, it is, as against the party who gave it, void in the hands of all parties, whether immediate or remote.

It may here be observed that in many cases a party may sue on the consideration where he cannot sue on the instrument, e.g., when an infant has given a bill or cheque

for necessaries. (Cf. *In re Soltykoff* [1891], 1 Q.B. 413.)

The burden of proving consideration lies on him, instead of consideration being presumed, as if he sued on the instrument.

Moreover, his rights as plaintiff are personal, not transferable, like his rights on the instrument.

The law as to cheques given in respect of bets is as follows:—

(1) If the bet was illegal under 5 & 6 Will. IV, c. 41, the bad consideration is a good defence as between the parties. The onus is on a third party suing to show that he was a holder in due course. A cheque given to secure money advanced for payment of racing bets is not deemed to have been given for an illegal consideration within that statute. (*Ex parte Pyke* (1878), 47 L.J. Bk. 100.)

(2) If the bet was void under 8 & 9 Vict. c. 109, section 18, a holder need not show that he was a holder in due course. The presumption of valuable consideration is still in his favour (*Fitch* v. *Jones* (1855), 5 El. & Bl. 238), and proof that the holder had notice of the consideration as between the parties does not disentitle him to recover. (*Lilley* v. *Rankin* (1886), 56 L.J. Q.B. 248.) Whereas if the bet were illegal under 5 & 6 Will. IV, c. 41, the knowledge of the holder as to the consideration as between the parties disentitles him to recover. (*Woolf* v. *Hamilton* [1898], 2 Q.B. 337—C.A.) This case decides that betting on horse-racing is "illegal".

(3) A cheque or bill, etc., the whole or any part of

the consideration for which is money or other valuable thing won by gaming or playing at any game (*c*) or by betting on the sides or hands of such as do game, or for repaying any money knowingly lent for such gaming or betting, or lent at the time and place of such play to any person so gaming or betting, or who shall during such play so play or bet, is deemed to be given for an illegal consideration. (9 Anne, c. 19, section 1; 5 & 6 Will. IV, c. 41.) The effect is to throw the onus of proving value and good faith on the holder.

(4) A cheque, etc., for a bet not on "games" within the Statutes, is deemed to be given for no consideration. (*Lilley* v. *Rankin*, *supra*.)

(5) A cheque, representing plaintiff's share of winnings under an agreement with defendant, whereby defendant was to employ their moneys in backing horses, may be sued upon. It is not an attempt to recover a wager, but money received to the plaintiff's use. (*Beeston* v. *Beeston*, 1875, 1 Ex. Div. 13.)

(6) A cheque, representing defendant's share of the loss under an agreement with plaintiff, whereby defendant was to employ money advanced by plaintiff in backing horses on a partnership system, losses to be shared, cannot be recovered on, in view of the Gaming Act, 1892, and 8 & 9 Vict. c. 109, section 18. (*Saffery* v. *Mayer* [1900], 1 K.B. 11—C.A.)

(7) By 5 & 6 Will. IV, c. 41, section 2, the value of a cheque, etc., given in respect of a game illegal under the

(*c*) Games are defined by the now repealed Act, 16 Car. II, c. 7, and include card games, horse- and foot-races.

Statutes, may if indorsed to a third party be recovered by the drawer, the money paid, when the cheque is met, being deemed to be a debt due from the payee to the drawer. (*d*)

Thus in *Lynn* v. *Bell* (1876), 10 Ir. R.C.L. 487, the plaintiff was held to be entitled to recover the amounts of certain bearer cheques given in respect of bets on horses and negotiated by the payee. It was held—(1) horse-racing was a game within 5 & 6 Will. IV, c. 41; (2) the cheques, paid by the plaintiff's banker, were paid by the plaintiff within section 2, and he could recover their amount; (3) the defendant could not set off a bearer cheque given by him to the plaintiff in respect of a bet on a horse, drawn by C., as such cheque was "paid" by C., and not by the defendant, within section 2, and the defendant could not therefore recover its amount. A somewhat similar decision of Judge Rentoul is stated to be under appeal. Another case was similarly decided in the Westminster County Court on 27 February, 1913.

(8) An English cheque, given partly for money lent to play baccarat, partly for money applied by the plaintiff in paying the defendant's losses at baccarat, in a country where such a consideration was not illegal, cannot be sued on here. (*e*)

(9) Where a cheque is given in respect of bets on unlaw-

(*d*) In *Crawley* v. *White* (1898), 78 L.T. 167, where an acceptor failed to recover from a drawer under this section, the consideration apparently was not an unlawful game, within the Statutes, but was a wager, not illegal, but merely unenforceable. Kennedy, J., thought section 2 applied only to "common places in which to game".

(*e*) *Moulis* v. *Owen* [1907], 1 K.B. 746; *Browne* v. *Bailey* (1908), 24 T.L.R. 644. An action will lie on the consideration, *Quarrier* v. *Colston* (1842), 12 L.J. Ch. 57; *Saxby* v. *Fulton* [1909], 2 K.B. 208.

ful gaming and is held over at the drawer's request, and on his promise to pay later, in consideration of the payee not declaring him a defaulter, or even is held over on a request not to sue, such forbearance upon request constitutes a new and a fresh agreement on which the payee may sue. (*f*)

Scots Law not requiring "consideration" to support a simple contract, section 38 is to be read, as for Scotland, with reference to that law, and consequently want of value is no defence *per se*. (Cf. Wallace and McNeil, "Banking Law," 3rd ed., 206; Hamilton's "Commentary on the Bills of Exchange Act," 56.) In the Transvaal, consideration has been held inessential to simple contracts, but I am not aware of any decision placing this construction on section 25 (1) of Transv. Proclam. 11 of 1902, corresponding to section 38 of the Act.

(*f*) Cf. *Goodson* v. *Gricrson* [1908], 1 K.B. 76, C.A.; *Hyams* v. *Stuart King* [1908], 2 K.B. 696, C.A., *diss.* Fletcher Moulton, L.J.; *Goodson* v. *Baker* (1908), 98 L.T. 415; cf. *Hodgkins* v. *Simpson* (1908), 25 T.L.R. 53. The plaintiff does not recover on the bill, etc., but on the fresh contract.

CHAPTER V.

Crossed Cheques and Cheques marked "Not Negotiable".

45.—It is provided by section 76 of the Act that—

(1) Where a cheque bears across its face an addition of (a) the words "and company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable"; or (b) two parallel transverse lines simply, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

46.—It is provided by section 77 of the Act that—

(1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally, the holder may cross it specially.

In *Akrokerri Mines, Ltd.* v. *Economic Bank* [1904], 2 K.B., at page 472, Bigham, J., held that the word "holder" covered a collecting banker. Suppose a person in possession under a forged indorsement, i.e. a non-

holder, or a thief of a cheque payable to bearer, another non-holder, crosses a cheque, is it crossed in law? Have collecting and paying bankers the protection of sections 80 and 82 respectively? (Cf. Paget's "Banking," 77-9.)

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable".

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

47.—It is provided by section 78 of the Act that a crossing authorized by this Act is a material part of the cheque (*a*); it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

It has long been a recognized practice for bankers to pay over the counter crossed cheques, which have been "opened" by the drawer by writing "pay cash" and signing the alteration. The use of cheque books with printed crossings has led to an increase of this practice and to very serious losses by bankers, through expert forgers stealing such cheques in the post and forging the drawer's signature to the words "pay cash". Accordingly bankers have recently considered the advisability

(*a*) *Carlon* v. *Ireland* (1856), 5 El. & Bl. 756, and *Bellamy* v. *Marjoribanks* (1852), 7 Exch. 389, are now of no authority on the effect of double crossing, or striking out of crossing. A crossing to a foreign banker is not regarded in practice as a special crossing within this subsection. ("Questions and Answers in Banking Practice," No. 216.)

of paying such "opened" cheques across the counter, and the subject was dealt with in the inaugural address of the President of the Institute of Bankers in 1911. ("Journal of Institute of Bankers," XXXII. 490.) It has been suggested "that no opening of a cheque be recognized unless the full signature (some banks accepted initials) of the drawer be appended to the alteration, and then only when presented for payment by the drawer or his known agent". ("Journal of the Institute of Bankers," XXXIII. 540.) The bankers doubt their right to refuse to recognize this irregular "opening," after many years' acquiescence in it. The author, however, sees no objection to a banker intimating to old or new customers that he will no longer, in view of frequent frauds, pay such cheques (except to drawer or known agent); further, the legality of thus altering the crossing seems highly doubtful. "It shall not be lawful for *any person*," must include the drawer, as well as a holder. And "obliterate" is defined to include "delete," which would appear to cover the case of cancelling the crossing in this way; if not a deletion, it would seem an "alteration" of the crossing.

48.—It is provided by section 79 of the Act that—

(1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.(*a*)

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque

(*a*) See note (*a*), p. 59.

crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Smith v. *Union Bank of London* (1875), 45 L.J. Q.B. 149, must not be now read as authority for the proposition that a banker, paying in contravention of the crossing, is liable to the drawer but not to the payee. In that case a payee specially crossed a cheque to his bank, having indorsed it. It was stolen, and a *bonâ fide* holder obtained payment of it, in contravention of the crossing, from the defendant bank. Held the defendant bank was not liable to the plaintiff. It was pointed out that the cheque, which was negotiable, had passed to the holder for value, and so the plaintiff had no property in it. On this ground the decision is still supportable, as the liability of the banker is only to the "true owner".

A cheque crossed to B., a foreign banker, refused payment on the ground of "Orders not to pay," and paid by the C. bank, a "case of need," will in practice, on the stop being removed, be paid by the drawee bank to the C. bank, notwithstanding the crossing to the B. bank. ("Journal of the Institute of Bankers," XXVI. 513, Qu. 2045.)

(*b*) Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this

(*b*) Cf. *Simmonds* v. *Taylor* (1857), 4 C.B. N.S. 463, before the Act.

Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

A banker has no right to debit the drawer's account with a cheque paid by the banker to a person not entitled to receive payment, in contravention of the crossing. The person receiving such payment is not liable if the property in the cheque has passed to him. In *Bobbett* v. *Pinkett* (1876), 1 Ex. Div. 368, a cheque payable to A. or order, and crossed to the X. Bank, was stolen by a thief, who *forged* A.'s indorsement and negotiated the cheque to B., who gave value, and paid the cheque into his account at the Y. Bank, who collected it, the bank on which it was drawn disregarding the special crossing. It was held that the drawer, who allowed his bank to debit him with the amount, could recover the amount from B. No property in the cheque passed to B.

Discussing this case in editions of his "Bills," previous to the seventh, Sir M. Chalmers (6th ed., p. 261) said: "If the cheque had been payable to bearer, or had been indorsed in blank by the payee before it was stolen, there would be no remedy apart from this section" (section 79). In each edition of this work, I have hitherto pointed out what appeared to me to be Sir M. Chalmers's error in

supposing that section 79 would afford a remedy to one who had lost such a cheque, and so ceased to be a "true owner," that title belonging to the party who subsequently gave value for it in good faith. My remarks almost exactly anticipated those of Sir John Paget. ("Banking," 1st ed., pp. 106-8.)

Sir M. Chalmers has now withdrawn his former remarks, in the seventh edition, in these words: "If the cheque were payable to bearer and had been indorsed in blank by the payee before it was stolen, and had got into the hands of a *bonâ fide* holder for value, there would, it seems, be no remedy, unless the cheque was crossed 'not negotiable'". In a note he adds: ". . . Is not 'the holder in due course' the 'true owner'. Cf. Paget on 'Banking,' 2nd ed., p. 80."

It is said to be the practice of some banks, where a crossed cheque has been dishonoured at the clearing-house, to pay cash on a subsequent presentment across the counter, if there are then funds to meet it. Such a practice would not appear to be sanctioned by the Act, and a bank would act at its peril.

A banker, except perhaps in Scotland, where a cheque operates as an assignment of funds, should refuse payment over the counter of a represented, crossed cheque. ("Questions and Answers in Banking Practice," 6th ed., 1909, Ans. 235, 236.)

49.—It is provided by section 80 of the Act that where a banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or

his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

The paying banker need not regard crossings to a particular account. Such are solely a direction to the collecting banker. "The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker." (Bigham, J., in *Akrokerri Mines, Ltd.* v. *Economic Bank* [1904], 2 K.B. at p. 472.)

50.—It is provided by section 81 of the Act that where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have, and shall not be capable of giving, a better title to the cheques than that which the person from whom he took it had.

The effect of crossing a cheque "not negotiable" (*c*) is "to put it much on the same footing as an over-due bill" (Chalmers), or, as we would suggest, on the same footing as a bill restrictively indorsed, but not so as to prohibit further transfer. (Cf. section 35 (3).) The important case of *Great Western Railway Co.* v. *London and County Bank* [1901], A.C., page 414, is considered in discussing the next section.

The advantage of adding the words "not negotiable," which, the general reader should observe, a holder as well as a drawer may add, is that, while the cheque is still

(*c*) A cheque crossed without these words is still negotiable. (*Smith* v. *Union Bank* (1875), 45 L.J. Q.B. 149.)

transferable, it is only transferable as is a postal order or any other transferable chose in action. A *bonâ fide* holder for value takes such a cheque subject to personal defences available to prior parties between themselves; e.g. a cheque so crossed was drawn in favour of a firm, and was fraudulently indorsed by one partner to A., who cashed it. Held the other partner could recover the amount from A. (*Fisher* v. *Roberts*, 6 T.L.R. 354.)

To cite the words of Halsbury, L.C., in the leading case of *The Great Western Railway Co.* v. *London and County Banking Co.* [1901], A.C., page 414, 17 T.L.R., page 700 :—

"It is very important that every one should know that people who take a cheque which is marked 'not negotiable,' and treat it as a negotiable security, must recognize the fact that, if they do so, they take the risk of the person for whom they negotiate it having no title to it".

It is stated ("Questions and Answers in Banking Practice," 6th ed., No. 457) that a banker is justified in refusing payment of a cheque, in which the words "not negotiable" have been erased and not initialled. It appears to me that even if such alteration were initialled or signed by the drawer, it would be such an alteration of the crossing as it would not be lawful, under section 78, for the drawer or any person to make, and that payment might be refused in any case.

51.—It is provided by section 82 of the Act, that—

Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or

specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner by reason only of having received such payment.

It seems clear that the protection afforded by this section extends to crossed cheques which are marked "not negotiable". In *Matthiessen* v. *London and County Bank* (1879), 5 C.P.D. 7, on the corresponding section, section 12, of the Crossed Cheques Act (39 & 40 Vict. c. 81), which united the present sections 81 and 82, it was contended that the protection only extended to cheques so crossed, but no such argument could be raised on the present Act.

It is to be observed:—

(1) The section only protects the banker if he receives payment without negligence.

Accordingly a banker who received payment of several cheques paid into his account by a customer, who was known to the banker to be only a commercial traveller, and who indorsed the cheques in the payee's, his principal's, name "*per pro.*," was held to be not entitled to rely on section 82, it appearing that he made no inquiry from his customer's principal whether the customer had any authority to indorse the cheques. (*Bissell* v. *Fox*, 1884, 1885, 51 L.T. 663, 53 L.T. 193, and see now *Morison* v. *London County and Westminster Bank*, 1913, 57 S.J. 427.)

And in *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.* (1900), 5 Com. Cas. 188, Kennedy, J., held that where the defendant bank collected cheques drawn in favour of the plaintiff company or order, and indorsed by the secretary of the plaintiff company, "Hannan's

Lake View Central, Ltd., H. Montgomery, Secretary," and paid by him into his private account at the defendants' bank, the plaintiff company having, as the defendants knew, a separate account at another bank in London, they (the defendant bank) had not acted "without negligence," and could not rely on section 82. (See *Bavins, Junr.* v. *London and South-Western Bank*, 5 Com. Cas. 1.)

In *Turner* v. *London and Provincial Bank* ("Journal of Institute of Bankers," XXIV. 220; "Times," 28 March, 1903) the jury found negligence against the defendant bank, in collecting cheques, value £1053, for a customer, whose reference, on opening the account, the bank never entered in the reference book, who gave as his address lodgings, which he speedily vacated, with the rent unpaid, a fact said to be known to the clerk in charge, but denied by him, and who never paid in cheques in his own favour, but always cheques in favour of other payees, the indorsements of two such separate payees being in the same handwriting.

There has been considerable discussion as to how far (1) a "not negotiable" crossing, (2) a crossing to payee's account, affect the duty of the collecting banker, and bear upon the question of negligence. As to the first point, Sir J. Paget is of opinion that the words "not negotiable" have "absolutely no significance to the banker, who takes such a cheque for collection, and that he is entitled absolutely to disregard them". ("Journal of the Institute of Bankers," XXIII. 274; "Banking," 283.) Judicially, a different opinion has been expressed. See Lord Brampton in *Great Western Railway Co.* v. *London and County Bank* [1901], A.C., at page 422. Channell, J., in

Bevan v. *National Bank* ("Journal of Institute of Bankers," XXVII. 491; "Times," 15 November, 1906), a case where section 82 was in issue, appeared to think that a banker had a higher duty as to the collection of "not negotiable" cheques. As to the second class—cheques crossed to particular accounts, Bigham, J., in *Akrokerri Mines, Ltd.* v. *Economic Bank* [1904], 2 K.B. 465, said: "The words 'Account A. B.' are a mere direction to the receiving bank as to how the money is to be dealt with after receipt". Channell, J., in *Bevan* v. *National Bank* (*supra*), observed: "It (such a crossing) was a direction to the receiving banker that the drawer desired to pay the particular cheque into the bank, which kept the account of the payee. To disregard a direction of that kind, if the banker had information, which might lead him to think the account, into which he was paying the cheque, was not the payee's account, would, in his opinion, be negligence." "The words (crossing to particular account) operate as a warning to him (collecting banker) to exercise special care and make reasonable inquiry, before he accepts the cheques for an account other than the specified one." ("Journal of the Institute of Bankers," XXVI. 264.)

(2) The section only extends to the ordinary case of collecting from the banker on whom the cheque is drawn. It would not protect a banker who collected from the drawer of a cheque, dishonoured on presentment for payment, as debt collector for the payee or a subsequent indorsee. (See *Gillespie* v. *International Bank of London* (1888), 4 T.L.R. 322, a peculiar case.)

(3) The section only extends to receiving for a customer.

A banker who received payment for a casual stranger is, of course, not protected. (*Matthews* v. *Williams, Brown & Co.* (1894), 63 L.J. Q.B. 494; *Lacave & Co.* v. *Crédit Lyonnais* [1897], 1 Q.B. 148.) The collection was apparently for a stranger in *Kleinwort* v. *Comptoir d'Escompte* [1894], 2 Q.B. 157; but this section was not discussed.

In *Lacave* v. *Crédit Lyonnais* (*supra*) the Paris branch of the defendant bank collected a cheque from the London branch for a stranger, and it was held that the presentation of the cheque to the London by the Paris branch was a conversion of the cheque in London by the Paris branch. Collins, J., in his judgment does not quite go so far as to say that a man, to be a customer, must have an account. He says: "Protection is only given to a bank, which does collect for a customer in the real sense, if he is a person who has an account at the bank; at all events, if he is a person whose relations are much nearer and closer than those of Ponce in this case".

Lord Brampton [1901], A.C., at page 422, says: "It is not necessary to say that the keeping of an ordinary banking account is necessary to constitute a person a customer". But Lord Davey (s.c. at pp. 421-2) appeared to think a current or a deposit account an essential.

In *Kleinwort* v. *Comptoir d'Escompte* (*supra*) the payee of a crossed cheque posted it to the plaintiffs, having specially indorsed it to them. It was stolen in transit, and a stranger, having obliterated the plaintiffs'

name as indorsees, and substituted a special indorsement to himself, presented the cheque at the defendants' bank in Paris.

They collected it for him through their London agent and handed him the money. Cave, J., found as a fact that the obliteration occurred after the posting. He held that delivery to the post office was delivery to the plaintiffs, who obtained a good title by the indorsement to them, and that the conversion took place in London, when the defendants received the money, and so the case was governed by English law and the defendants were liable.

A man who, having no account, has habitually got crossed cheques, payable to his order, cashed for him across the counter, the bank subsequently collecting the amount for themselves, is not "a customer," nor is the payment received for him, but for the bank itself as holder in due course.

This is the decision of the House of Lords in *Great Western Railway Co.* v. *London and County Bank*, [1901], A.C. 414.

The facts were as follows:—

H. obtained a cheque from the appellants by a false pretence. It was payable to H. or order, and crossed generally with the words "not negotiable". The respondent bank gave H. cash for the cheque, as they had done on previous occasions, and collected the cheque. H. had no account at the respondent bank.

The House of Lords held (1) that H. was not a customer; (2) that in any case, as the bank gave him

cash for the cheque, the bank took it as a holder, and not as agent for collection, and so the bank received payment for itself; and (3) that the bank could not, therefore, rely on section 82 in an action by the appellant company for money had and received, or for damages for conversion of the cheque, and that the bank had no title as holder, inasmuch as the cheque was marked "not negotiable" and passed to the bank subject to the defect of title of H., the transferor.

The Court of Appeal [1900], 2 Q.B. 464, had regarded H. as a customer, and had (*dub.* Vaughan Williams, L.J.) regarded the bank as agent for collection, not as holder of the cheque.

Lord Brampton [1901], A.C., at page 422, suggested that the collection of a cheque marked "not negotiable," without inquiry, might, in the circumstances, have been negligence, which in itself would have disabled the bank from relying on section 82. In *Bissell* v. *Fox* (1884), 51 L.T.R. 663, Denman, J., clearly took the view that where a cheque is at once placed to the customer's credit as cash the banker subsequently collects it for himself, and not for the customer. But the Court of Appeal in *Great Western Railway Co.* v. *London and County Bank* [1900], A.C., thought it possible to regard a bank cashing a cheque for a customer, not as purchasing it, but as advancing on the security of it.

In *Clarke* v. *London and County Bank* [1897], 1 Q.B. 552, the cheque was paid in by a customer for collection, and was only credited to his account when paid, and this was the *ratio decidendi*. The fact that the

customer was overdrawn and was allowed to draw a further sum against the cheque when paid in, before it was cleared, and that the bank applied part of the sum received on collection in repayment of the overdraft, did not deprive the bank of the protection of section 82.

In the important cases of *London City and Midland Bank* v. *Gordon* and *Capital and Counties Bank* v. *Gordon* [1903], A.C. 240, the question was finally decided in what capacity a banker receives payment of a crossed cheque already credited by him to his customer as cash.

In *City and Midland Bank* v. *Gordon* the facts were as follows: Gordon's clerk, Jones, received cheques payable in most cases to Gordon or order. He took the cheques in dispute to the defendants' branch, where he had an account, having in the majority of instances first crossed them; he forged his employer's signature to such of the cheques as were payable to "order," and at the defendants' request indorsed his own name to all the cheques to give them his personal security in the event of any being refused payment.

The bank credited him with the amounts in his account, on payment in, before clearance, and he was allowed to draw against them at once: but for these cheques his account would have been in debt. The plaintiff sued as true owner for the conversion of the cheques.

The cheques included: (1) "Order" cheques and one "bearer" cheque drawn on other banks than the defendants' and paid in uncrossed, being crossed by the defendants for collection; (2) bankers' drafts, addressed to the defendants' head office, drawn by a country manager

and paid in uncrossed; (3) "order" cheques drawn on other banks and paid in crossed, including some crossed "not negotiable," and "bearer" cheques drawn on other banks and paid in crossed; (4) orders addressed to a bank other than the defendants' bank for payment of money to the plaintiff, conditional on the signature of a receipt, and paid in crossed.(*d*)

The appeal to the House of Lords was confined to these four classes of instruments, and the view taken in the Court of Appeal was upheld, viz.: that a crediting of cheques as cash before clearance renders their subsequent collection one on behalf of the collecting banker, and not his customer, within section 82; secondly, that section 82 does not extend to cheques paid in uncrossed, and subsequently crossed by the banker himself. On the first point Lord Lindley said: "Now, when the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. . . . The moment a bank places money to its customer's credit, the customer is entitled to draw upon it. It appears to me impossible to say that under these circumstances the bank received payment for their customer Jones."

On the question of the banker's drafts the decision below was varied. It was held that although not bills within the Act, nor documents to which the Act was extended by section 17 of the Revenue Act, 1883, inasmuch as they were not issued by a customer to a banker, they were drafts on a banker payable on demand within section

(*d*) These correspond to classes 1, 3, 6, and 8 in 1903, A.C. 240,—the only instruments in issue on the appeal.

19 of 16 & 17 Vict. c. 59, and the bank was protected in paying them on forged indorsements. The judgment of Bigham, J., in *Brown & Co.* v. *National Bank of India* (1902), 18 T.L.R. 669, in which he reluctantly followed the Court of Appeal on this point, is thus overruled.

In *Capital and Counties Bank* v. *Gordon* the facts were similar, the cheques being of the sort described here as class (3) and in the report as class (6), and the judgment the same. In *Akrokerri Mines, Ltd.* v. *Economic Bank* [1904], 2 K.B. 465, cheques were credited to N. in the ledger, before clearance, but not in the pass-book, and no right to draw against them before clearance was thus conferred. Bigham, J., held that the defendant bank was protected by section 82.

In consequence of the Gordon cases, the Crossed Cheques Act, 1906 (6 Edw. VII, c. 17), was enacted, providing as follows:—

Section 1. A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

Section 2. This Act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this Act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906.

It is to be observed upon this Act: (i.) It only maintains the protection of the banker as a collecting banker. The title to a cheque credited as cash before clearance is not affected. A banker is still a holder for value in such

a case. (ii.) The Act only applies to cheques strictly so called and does not impliedly include (*a*) dividend warrants or (*b*) orders for the payment of money within section 17 of the Revenue Act, 1883 (including "receipt" form cheques). On this point Paget, "Banking," 279-81, and "The Laws of England, 'Bankers and Banking,'" 600, are in agreement.

In *Tate* v. *Wilts and Dorset Bank* (1899), "Journal," xx. page 376, the Divisional Court held that a banker was protected who collected a cheque for a non-customer, (*e*) who, having obtained it by false pretences, had a voidable title to it.

But a similar contention by Lawrence, K.C., on behalf of the defendant bank in *Great Western Railway Co.* v. *London and County Bank* [1901], A.C., page 414, was quite unsuccessful.

A person who has a voidable title has a "defective title," and if he is not a customer, the banker who collects a cheque for him cannot be protected, as section 82 provides that he is only to be protected if the person with a defective title, for whom he collects, is a customer.

A crossing, "Account of J. F. M., National Bank, Dublin," does not restrict the transfer of the cheque within the meaning of section 8. (*National Bank* v. *Silke*, 1891, 1 Q.B. 435.) It operates as a warning to the collecting banker, much like a crossing, before it received legislative recognition. (Cf. *ante*, p. 68.)

(*e*) He was a prospective customer—opening an account with a third party's cheque. He would be a customer if the cheque were cleared, *per* Darling, J.

In view of section 73, there appears no reason to suppose that a cheque cannot be made "not transferable" under section 8 (1), as well as "not negotiable" under sections 77 (4) and 81. The judgments of Fry and Lindley, L.JJ., in *Silke's Case*, and the language of section 8 tend to confuse "not transferable" and "not negotiable". The question in *Silke's Case* was, "Was the cheque transferable?" It was decided that the above crossing did not prevent a bank taking the cheque from J. F. M. from acquiring a title to it as holders and suing the drawer upon it. (See section 23 and notes, and section 30 and notes.)

The section only affords protection where the banker has received a cheque already crossed, and not where he crosses an uncrossed cheque for collection under section 77. (*Bissell* v. *Fox*, 1884, 1885, 51 L.T.R. 663, 53 L.T.R. 193; and cf. *London City and Midland Bank* v. *Gordon, supra.*)

By section 95 the provisions of the Act as to crossed cheques are made applicable to dividend warrants. But the Crossed Cheques Act, 1906, does not apply to such nor to orders for the payment of money. (Cf. *ante*, p. 75.)

However, in *Thairlwall* v. *G.N. Railway Co.* [1910], 2 K.B. 509, a dividend warrant not payable after three months, unless countersigned, was held to be a "cheque" and within section 69 (*sed quære*).

To obliterate, add to or alter a crossing, special or general, of a cheque, or knowingly offer or utter, etc., a cheque so altered, with intent to defraud, is a felony

punishable with penal servitude for life. (24 & 25 Vict. c. 98, section 25.)

It is provided by section 17 of the Revenue Act, 1883, that section 25 of 24 & 25 Vict. c. 98, and sections 76 to 82 of the Bills of Exchange Act, shall extend to "any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, . . . and shall extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render such a document a negotiable instrument."

A cheque with a receipt form attached, and running, "Pay . . . provided the receipt at the foot hereof be duly signed," has been held to be outside the provisions of this section, as well as of section 19 of the Stamp Act, 1853. (*London City and Midland Bank* v. *Gordon* [1903], A.C., at p. 252.) But Sir John Paget ("Banking," pp. 58-9) is of opinion that Lord Lindley only meant that "though these documents were within the crossed cheques sections (76-82), under section 17 of the Revenue Act, the bank had lost the protection of section 82 by reason of having treated them as cash".(*f*)

Sir J. Paget regards all instruments of this sort as

(*f*) Lord Lindley said: "These documents . . . are not for reasons given brought within it (the Act) by section 17 of the Revenue Act, 1883". The only "reasons given" in his judgment related to drafts by one branch on another, which were not "documents issued by a customer". Hence Paget thinks his lordship refers to the reasons given in the Court of Appeal. (See also his opinion in "Journal of Institute of Bankers," XXVIII. 228.)

"not negotiable" in the sense of "not transferable" and available only in the hands of the payee—even where ostensibly payable to bearer. ("Banking," pp. 57-60.) Such embarrassing documents are objectionable in practice, though in increasing use. ("Questions and Answers in Banking Practice," 6th ed., 40-43.) They frequently also limit the time within which the document will be paid—another irregularity.

CHAPTER VI.

BLANK CHEQUES AND IMPERFECT CHEQUES—FRAUDULENT FILLING IN AND ALTERATION OF AMOUNT—THE WORDS AND FIGURES —MATERIAL ALTERATION—CRIMES RELATING TO FORGERY, ETC., OF CHEQUES.

52.—When a simple signature on a blank form of cheque is delivered by the signer in order that it may be converted into a cheque, it operates as a primâ facie authority to fill it up as a complete cheque for any amount; and in like manner, when a cheque is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit.

(*a*) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that, if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. (Section 20.)

(*a*) See *Flower* v. *Shaw* (1848), 2 C. & K. 703. The plaintiff, a secretary, without authority, filled up a cheque drawn by directors for an amount he alleged was due to him. Held, even if such sum was due, the cheque was a forgery and the plaintiff could not recover. Cf. also *R.* v. *Wilson* (1847), 2 C. & K. 527.

The signer of the inchoate instrument must "deliver" it with a view to completion. If he never do so, or if it be returned to him still incomplete, and be never re-delivered, he is not liable. (*Baxendale* v. *Bennett*, 1878, 3 Q.B.D. 525, *per* Brett, L.J.) In *Ingham* v. *Primrose* (1859, 7 C.B. N.S. 82) the bill was complete, when the defendant tore it. Brett, L.J., however, does not (*loc. cit.*) distinguish it on this ground, but disagrees with it, as Vaughan Williams, L.J., did in *Smith* v. *Prosser* [1907], 2 K.B., at page 746. A delivery to an immediate party, such as a payee, is not a negotiation within the meaning of the proviso. (*Herdman* v. *Wheeler* [1902], 1 K.B. 361.) On very similar facts in *Lloyd's Bank, Ltd.* v. *Cooke* [1907], 1 K.B. (C.A.) 794, the Court held the defendant, S., estopped at common law, from denying the authority of the defendant, C., to fill up a note signed by him, S., in blank, for £1000, the actual authority being for £250. Fletcher Moulton, L.J., differed from the view in *Herdman* v. *Wheeler* as to there being no negotiation to an immediate party.

In *Smith* v. *Prosser* [1907], 2 K.B. (C.A.) the defendant's agent, T., in fraud of the defendant and without authority, took his blank signatures to the plaintiff, and, on his agreeing to buy them, filled in the dates and amounts. It was held that the defendant was not estopped from denying his liability. The proviso did not apply as there had been no "negotiation" after "completion," and subsection (2) did not apply, as the notes were not filled up strictly in accordance with the authority given.

53.—Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. (Section 9 (2).)

A banker, though justified in paying the amount in words, would in practice return such a cheque with answer, "Words and figures differ". (See Moxon, "Practical Banking," 10th ed., p. 9, and "Questions and Answers in Banking Practice," 6th ed., 134-7.) The amount in figures, if altered to correspond with the amount in words, must bear drawer's initials (*ib.*). Perforations such as "not exceeding £2" are common, but are not recognized by statute. A banker is justified in refusing to pay a cheque, though words and figures agree, if the amount exceeds that denoted by the perforation. ("Questions and Answers in Banking Practice," 6th ed., Nos. 138, 139.) Some banks, where words and figures differ, pay the lower sum, even if indicated in figures. This is not consistent with the Act.

The words are the governing and only essential part of the cheque, so far as the amount payable is concerned.

In *Garrard* v. *Lewis* (1882), 10 Q.B.D. 30, the amount was inserted in figures only. A holder inserted a larger sum in words, and altered the figures to correspond.

The drawer was held liable on the bill as altered, to a holder in due course. It was legally immaterial that the figures had been altered to suit the words, inasmuch as, even if they had not, the amount denoted in words would have been the amount payable. The amount in words should, therefore, be always filled in before issue.

54.—Where a customer of a banker (disregarding the caution printed on his cheque book to write words and figures close to the left hand margin) draws a cheque, with the words and figures written in the middle of the cheque, and by the insertion of other words and figures to the left of those first written, by another person without authority, the cheque is altered to one of larger amount, and is presented at the drawee bank, such alteration not being apparent and is paid according to its apparent tenor, the loss occasioned by the customer's negligence falls on the banker, in exception to the general rule that as between two innocent parties, the loss falls on the one, whose negligence has directly occasioned it.

The law is thus stated in order to accord with *Colonial Bank of Australasia* v. *Marshall* [1906], A.C. 559, which coming upon the top of *Scholfield* v. *Londesborough* [1896], A.C. 514, may, though a Privy Council decision, be taken as a probable expression of the law as the House of Lords might lay it down. The great importance of the subject, however, necessitates an examination of the case law on this subject, beginning with *Young* v. *Grote* (1827), 4 Bing. 253, where the facts were these: Young left a blank cheque with his wife to be filled up to pay wages. Worcester, his clerk, filled it up payable to "wages or bearer" for £50 2*s.* 3*d.*, the word "fifty" commencing with a *small* letter, and showed it so filled up to Mrs. Young, who sanctioned it, although Worcester had left ample space enough to alter the amount in words and figures. Afterwards Worcester altered the sum payable to £350 2*s.* 3*d.*, and the alteration was in no way apparent. The defendant, the banker, paid this sum to Worcester.

It was held on a rule *nisi* to show cause why Grote should not pay Young £300, the arbitrator having found Grote entitled to retain it, that he could debit Young's account with £350 2*s* 3*d*., "as he had been misled by a want of proper caution on the part of his customer" (Best, C.J., at p. 260), and "as the blame is all on one side" (Burrough, J., at p. 260), and as "there was certainly great negligence on the part of Young" (Gaselee, J., at p. 261).

This case has been frequently adversely criticized.

In *Scholfield* v. *Londesborough* [1896], A.C. 514, the respondent accepted a bill for £500, which was so drawn that S., the drawer, was enabled to alter it, without its being apparent, to £3,500.

The House of Lords decided that a holder in due course could only recover £500.

Halsbury, L.C., at page 522, says *Young* v. *Grote* must be examined to see "how far it ought to be quoted as an authority for anything," and he proceeds to comment on it, and observes that the judgments show much confusion.

Now on one point all the four judges in *Young* v. *Grote* were agreed—Young had been negligent, and Grote had not. (*b*)

It is true that Best, C.J., and Park, J., think the negligence consisted in Young's leaving blank cheques with his wife, who was ignorant of business.

(*b*) Apart from the customer's negligence, it had long been settled that the loss fell on the banker. (*Hall* v. *Fuller* (1826), 5 B. & C. 750.)

It appears to me a better view that the negligence for which he had to suffer was that of his wife, who as his agent sanctioned the cheque drawn by Worcester with spaces for alteration. Park, J., also decides upon the ground that the cheque left by Young to be filled up by his wife, "when filled up by her, became his genuine orders" (p. 260); and this reason is described by Halsbury, L.C., 1896, A.C., at page 523, as "the perfectly sound view upon which he decides in the defendant's favour".

Lords Watson and Macnaghten also think the decision supportable on the ground that the delivery of a blank cheque gives an implied authority to a holder to fill it up for any amount, and they cite Parke, B., in *Robarts* v. *Tucker* (1851), 16 Q.B. 560, who, in commenting on *Young* v. *Grote*, said: "The customer had, by signing a blank cheque, given authority to the person in whose hands it was to fill up the cheque in whatever way the blank permitted".

But the cheque when fraudulently altered was *not* a blank cheque. It was a genuine order for £50 2*s.* 3*d.* Undoubtedly Park, J.'s observations have contributed to the confusion as to the *ratio decidendi*, which later judicial comments plainly show. Lords Watson and Morris [1906], A.C., at pages 536 and 547, regard it as turning on the implied authority to fill up a blank bill, and Lord Macnaghten at page 545 refers to other opinions to the same effect.

In law, it is submitted, the intervention of the wife may be left out of consideration, and the case treated as

if Young had signed the cheque, when presented by Worcester, filled up for £50 2*s.* 3*d.* (*c*)

The late Judge Willis, in his lectures (*d*) on negotiable instruments, expressed his opinion that the decision cannot be so regarded, inasmuch as the case was not one of filling up a blank cheque. In point of law, the case was as if Young, or Mrs. Young, as his agent, had written out the cheque for £50 2*s.* 3*d.*, in the careless way in which it was written, and had then given it to Worcester.

The negligence which led to the loss was that of Mrs. Young in sanctioning the cheque as drawn by Worcester, and Young would have been no less liable for her negligence as his agent even had he been able to show that she was ordinarily a most accomplished woman of business. It appears, therefore, that the observations of Best, C.J., and of Park, J., as to the negligence consisting in leaving the cheque "with a female" are rightly condemned by Halsbury, L.C., as irrelevant.

It is pointed out by Cockburn, C.J., that the case was "decided without reference to estoppel," though Cranworth, C., in *Bank of Ireland* v. *Evans' Trustees* (1855), 5 H.L.C., at page 413, thought otherwise.

(*c*) The author had always taken this view, which is judicially expressed by Bigham, J., in *Union Credit Bank* v. *Mersey Docks Board* [1899], 2 Q.B., at p. 211. But the judge's observation that the loss was equivalent to the delivery of a *blank* cheque is hardly in accordance with the facts. The act of Mrs. Young (or we may say of Young) in sanctioning the cheque as drawn for £50 2*s.* 3*d.*, was equivalent to its signature by Young in that form, by force of the maxim, "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur".

(*d*) Lecture vi.

The various grounds on which the case was supposed to have been decided have been examined judicially by Lord Macnaghten in [1896], A.C., pages 544-6, who after citing Cranworth, C., in *Orr* v. *Union Bank of Scotland* (*infra*) and in *Bank of Ireland* v. *Evans' Trustees* (*supra*), and referring to Pothier, concludes that "in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable." (*e*)

In *Swan* v. *North British Australasian Co.*, 2 H. & C. 175, the decision in *Young* v. *Grote* is freely commented upon, and Cockburn, C.J., explains that the decision may have been with the object to prevent circuity of action. Young could sue Grote for wrongfully paying the enlarged amount, and Grote could sue Young for the loss sustained by the latter's negligence. This view was also taken in *Halifax Union* v. *Wheelwright* (*infra*) (*f*).

(*e*) Cf. his dry remarks at p. 544 as to the conflicting explanations of the case being "regarded by some judges as a badge of merit and a passport to the confidence of the profession. But when you are in search of a principle, the effect is rather embarrassing."

(*f*) The late Mr. Thomas Beven has examined the case very thoroughly in connexion with Marshall's case in L.Q., xcii. 390-408. Cf. also his "Negligence," 3rd ed., 1317-40. He expressly repudiates both the estoppel and the blank bill explanations and relies on the same *ratio decidendi* as the author, saying it is "Most unequivocally stated by Best, C.J.: 'We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer'".

Coleridge, J., in *Morison* v. *London County and Westminster Bank* ("Times," 4 March, 1913) states that *Scholfield* v. *Londesborough* settled, *inter alia*, that "there was no duty incumbent . . . on the drawer of a

In *Halifax Union* v. *Wheelwright* (1875), 32 L.T. 802, it was held that a bank manager who acted as treasurer to the plaintiff corporation, and who had paid drafts drawn on him and fraudulently altered by a person in the employ of the corporation, could defend such payments on the ground that the carelessness of the corporation in signing the drafts, drawn so as to be easily capable of alteration by the person who wrote out the drafts, had led to the drafts being paid.

The defendant had also paid some drafts with forged indorsements, and it was held that he was not a banker within section 19 of 16 & 17 Vict. c. 59, to which section 60 of the present Act corresponds. However, in the peculiar circumstances of the case, he was held not liable for the amount of such payments, as the only receipt by him was the receipt of the bank of which he was manager, and where the plaintiffs practically had the account in respect of which he was treasurer, and the bank being discharged under section 19, he could not be made liable.

The principle upon which *Young* v. *Grote* in conjunction with duty of customer to banker rests, that "a man

cheque towards *subsequent holders* to see that . . . the cheque was such that it could not be fraudulently altered after it left his hands". This in no way disturbs the view that there may be such a duty to the *drawee banker*.

Kennedy, J., in *Lewes Sanitary Laundry* v. *Barclay & Co.* (1906), 95 L.T. 444, assumed in general "a duty to be careful not to facilitate any fraud, which, when it is perpetrated, is seen . . . to have flowed in natural and uninterrupted sequence from the negligent act". This well serves to separate *Young* v. *Grote* from such cases as the one then before him.

cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own," was approved in the judgment of Cleasby, B., in the Court of Exchequer; and in *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, Lord Cranworth, in commenting on *Young* v. *Grote*, said (at p. 523): "The decision went on the ground that it was by the fault of the customer the bank had been deceived. Whether the conclusion in point of fact was in that case well warranted is not important to consider. The principle is a sound one that where a customer's neglect of due caution has caused his bankers to make a payment on a forged order he shall not set up against them the invalidity of a document which he has induced them to act upon as genuine."

In *Scholfield* v. *Londesborough* there was some conflict of opinion as to whether the respondent had been negligent. Lopes, L.J., in the Court of Appeal thought he had.

Charles, J., who tried the case at first instance, found on the facts that he had not been negligent. But both were agreed as to the general duty of an acceptor of a bill "not to be negligent with regard to the form of the instrument," contrary to the opinion of Esher, M.R., and Rigby, L.J.

The House of Lords inclined to the view that he had not been negligent. Halsbury, L.C., at page 522, said: "I entirely concur that it . . . was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it". Lord Watson (at pp. 541, 542) expressed a similar view.

So far as the decision in *Young* v. *Grote* turned on the relation of banker and customer, the House of Lords does not expressly condemn it in *Scholfield* v. *Londesborough*. (See Lord Davey at p. 550; Lord Morris, p. 547; and Lord Shand, p. 548.)

In *Marcussen* v. *Birkbeck Bank* ((1889), 5 T.L.R. 179, 463, and 646, "Journal," XI. p. 403, on the new trial only), it was held that the defence that the drawer's negligence in drawing the cheque had misled the banker into paying the amount as altered ought to have been properly put before the jury, and that it was not, and that there must be a new trial.

On the new trial, Mathew, J., directed the jury that if a cheque was so carelessly drawn as to expose a banker, using reasonable care, to the risk of paying what was not intended, the banker was not liable. ("Journal," XI. p. 403.) This was a case where the plaintiff gave a stranger a cheque for £8 odd, open, and payable to bearer. The stranger altered the amount to eighty in words and figures, the commonest and easiest alteration of all.

This trial was previous to *Scholfield* v. *Londesborough*.

Young v. *Grote* was again commented on in the decision of the Privy Council in the *Imperial Bank of Canada* v. *Bank of Hamilton* [1903], A.C. 49. In that case a cheque was drawn for five dollars, and was certified by the drawee bank as good. The drawer then altered the amount to 500 dollars, and paid it into his newly-opened account at the appellants' bank. The respondents paid the cheque to the appellants without looking at their books, the cheque bearing the bank stamp as certified.

It was held that they were entitled to recover the amount so paid. There was no doubt that the condition of the cheque when certified afforded opportunity for the fraudulent alteration.

Lord Lindley delivering their Lordships' judgment said: "If the principle laid down in *Young* v. *Grote* could still be acted upon, the Bank of Hamilton . . . would be estopped from denying that the cheque was a certified one for 500 dollars. But after the decision in the House of Lords in *Scholfield* v. *Londesborough*, it was hopeless to contend that . . . the bank was not at liberty to prove that the cheque had been fraudulently altered after it had been certified."

It was further held that the payment of a certified cheque without reference to the books was not negligence.

Another point as to notice of dishonour is dealt with elsewhere.

The most recent case, in which *Young* v. *Grote* is repudiated, is *Colonial Bank of Australasia* v. *Marshall* [1906], A.C. 559, where cheques were filled up by M., a trustee, with the words and figures towards the centre of the cheques. He sent them to his co-trustees, who signed and returned them, and M. then signed also, and fraudulently increased the amounts by adding words and figures to the left, in the blank spaces. The original words began with *capital* letters, unlike the cheque in *Young* v. *Grote*. There was a defence of estoppel set up by the bank at first instance, and the C.J. directed the jury that it should succeed, if the bank had been misled, and if the negligence of the two co-trustees of M. had occasioned the fraud and

loss. Judgment for the bank was reversed on appeal to the High Court of Australia, after being confirmed by the S.C. of Victoria.

The Privy Council (Lords Halsbury and Macnaghten, Sir A. Wilson and Sir A. Wills) upheld the High Court, and their Lordships observed: "That case (*Young* v. *Grote*) was critically examined in *Scholfield* v. *Londesborough*, and the latter case has now become the governing authority which must prevail so far as the principles laid down in it extend". This assumes a conflict of principles between the two, which is not wholly warrantable. Several of the Court in *Scholfield* v. *Londesborough* distinguished and approved *Young* v. *Grote* as a case between banker and customer. Lord Halsbury was its only uncompromising opponent. The judgment proceeds to recognize (p. 567) the distinction between the two cases, and proceeds: "No attempt was made to define the extent of such obligation (of customer to banker); it was unnecessary to do so in that case (*Scholfield* v. *Londesborough*), nor do their Lordships propose now to attempt any abstract definition of such duty. Indeed it would be impossible to do so, seeing that the extent of the duty may depend upon an agreed or established course of dealing between the parties. . . . The principles there laid down appear . . . to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them is not by itself any violation of that obligation." This decision caused grave dissatisfac-

tion. Two special Acts were passed after the High Court decision in the Colonies to circumvent it. (*g*) The President of the Institute of Bankers made it the subject of strong comments in his inaugural address. (*h*)

Sir M. Chalmers, in view of this decision, regards *Young* v. *Grote* as "finally discredited". ("Bills," p. 82.) Sir John Paget observes: "If there is a recognized duty from the customer to the banker in relation to the drawing of cheques, where does it come in, and what is its nature, if it does not cover a case like this?" He adds that the banker's right to debit the original amount, if he cannot debit the altered amount, is questionable. ("Banking," pp. 200-1.) Though the proposition 54 is stated as if *Young* v. *Grote* were definitely overruled, such is not yet the case. The editors of "Grant on Banking" (10th ed., p. 16) regard it as still open to the Lords to approve it. A Privy Council decision does not bind our Courts. The facts were not quite identical, the sanctioning of the cheque with words commencing with a small letter being stronger evidence of negligence in the older case, than the recent one afforded. Even in *Scholfield* v. *Londesborough* too many of the Lords saved *Young* v. *Grote* from condemnation for it to be taken as overruled on that occasion. Lord Watson [1906], A.C., at page 537, expressly recognized the exception 'in the case where one of the parties to the instrument has either by express agreement or by implication established in the

(*g*) Tasmania, 6 Edw. VII, 29; Queensland, 5 Edw. VII, 7. The Tasmanian Act was limited to cheques, the other covered "bills or notes" payable at bankers.

(*h*) "Journal of Institute of Bankers," xxvii. 473, Nov., 1906.

law, become bound to use such precautions" (i.e. against the commission of crime).

The customer, by accepting a cheque book, warning him not to draw cheques in a manner which may facilitate the insertion of the words and figures, may, perhaps, be deemed to have impliedly agreed not so to draw them. And if he owe no such duty in consequence, what, conceivably, is the duty which their Lordships, in Marshall's case, allowed to exist, but refused to define?

The present position of *Young* v. *Grote* is largely the result of Lord Halsbury's inveterate dislike of the case. As Mr. Beven drily said: "If Lord Halsbury was competent to overrule *Young* v. *Grote*, . . . he has done so". Yet, with submission, some of his reasoning is open to criticism. His analogy between the loss by negligence of a pocket handkerchief, no title passing to a *bonâ fide* purchaser from the thief [1906], A.C., at page 522, and the case of a negotiable instrument, negotiated after fraudulent alteration occasioned by negligence, "assumes an identity between the law as to chattels and the law as to mercantile paper"—which is far from the fact—negligence in the custody of the latter leading constantly to changes of title. Again, Sir John Paget has shown ("Banking," pp. 191-4) that the learned Lord has somewhat misconceived the passage in Pothier, relied on in *Young* v. *Grote*, and that the jurist's remarks are not obnoxious to the charge of vagueness, being "sedulously confined to negligence . . . in the actual drawing of the cheque". This limitation, and the fact that the negligence must be, as explained in *Patent Safety Gun Cotton*

Co. v. *Wilson* (1880), 49 L.J. C.P. 713, and in *Arnold* v. *Cheque Bank* (1876), 45 L.J. C.P. 562, in the transaction itself, appear to obviate the danger of any extension of the liability of the customer, if he has any, to cover such a case as that of his leaving his cheque book unlocked (in disregard of the printed caution on it) and so facilitating a forgery. Sir M. Chalmers appears to think that in Marshall's and such cases, the negligence was merely *causa sine quâ non* and not *causa causans.* ("Bills," 82, and cf. 228.) But it appears to me that the negligence was the proximate cause, there being no other except the dishonesty of the forger. (*i*)

Where trustees under a paving act signed cheques, which had been drawn by the clerk to the clerk to the trust in such a manner as to be capable of alteration, it was held that they could not charge the clerk to the trust with negligence, if the cheques were altered, nor with his clerk's misconduct in altering them, for it was their duty not to sign cheques so drawn. (*Whitmore* v. *Wilks* (1828), 3 Car. & P. 364.)

55.—When a cheque is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the cheque is discharged. (*j*)

(*i*) It is perhaps worth remarking that in Marshall's case there was no *issue* of the cheques, M., a drawer, presenting them for payment. Probably the handing of the cheque by Mrs. Young to Worcester was not an *issue* either, as I should be inclined to say that Worcester did not take as "holder," although conceivably he would come within the definition of it. The issue of such carelessly drawn cheques would seem to involve greater negligence than the mere handing of them to a co-trustee and drawer, or to a confidential clerk, to obtain payment.

(*j*) If bankers pay a cancelled cheque drawn by a customer under circumstances which ought to have excited their suspicions and induced

In like manner any party liable on a cheque may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right or recourse against the party whose signature is cancelled is also discharged.

A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative: but where a cheque or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. (Section 63.)

As to the right of a banker to return a cheque, cancelled by mistake under the impression that it was to be paid, see *Fernandez* v. *Glynn*, 1 Camp. 426 n. Where a cheque is presented for payment bearing marks of accidental mutilation (as if it be torn in opening the envelope containing it) a banker's proper course is to return it with the answer: "Mutilated—will pay on banker's guarantee". ("Journal," xxv. 389, Q. 1979; "Questions and Answers in Banking Practice," 6th ed., No. 507.)

56.—Where a cheque is materially altered without the assent of all parties liable on the cheque, the cheque is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provided that where a cheque has been materially altered, but the alteration is not apparent, and the cheque is in the hands of a holder in due course, such holder may avail himself of the cheque as if it had not been altered, and may enforce payment of it according to its original tenor. (Section 64 (1).)

them to make inquiries before paying it, they cannot take credit for the amount. (*Scholey* v. *Ramsbottom* (1810), 2 Camp. 485.)

Scholfield v. *Londesborough* (*supra*) supplies an illustration.

57.—In particular the following alterations are material, namely, any alteration of the date, the sum payable, the crossing, and the branch at which the cheque is payable. (Sections 64 (2) and 76.)

The word "apparent" was in *Leeds Bank* v. *Walker* (1883), L.R. 11 Q.B.D. 84, construed to mean "apparent to the bank, though not perhaps to an ordinary person," but this construction was not necessary to the judgment, which was that the latter part of section 64 (1) did not apply to a Bank of England note.

In *The Bank of Montreal* v. *The Exhibit and Trading Co., Ltd.* (1906), 11 Com. Cas. 250, the addition of the word "Limited" was thought by Phillimore, J., not to be an "apparent alteration" so as to vitiate the instrument in the hands of holders for value. The judge proceeded "whether the alteration was a 'material' alteration . . . I am not prepared to decide, nor is it necessary that I should, as the effect of holding that the alteration is not 'apparent' is to set up the note according to its original tenor". But the proviso only applies where the alteration is "material". Where not, the alteration does not avoid the bill at all. On the authority of *Atwood* v. *Griffin* (1826), 2 C. & P. 368, Sir M. Chalmers and Dr. Heber Hart state the alteration of a "bearer" to an "order" cheque is immaterial. If this be understood to mean alteration before negotiation, it may be true, but Dr. Hart's language in particular is too wide. He says (p. 385, cf. Chalmers, p. 239): "Where a cheque is drawn

payable to a person named a bearer, the holder may alter the word 'bearer' to 'order' ". Suppose a cheque is drawn payable to "A. B. or bearer". It is negotiated by delivery to C. D., who strikes out "bearer" and inserts "order". The drawee bank refuses to pay it, as lacking A. B.'s indorsement. What both authors mean is that A. B. may alter the cheque so as to require his indorsement. *Atwood* v. *Griffin* seems to have turned on the right of a holder to insert a payee's name in a blank.

To alter the date of a cheque to a subsequent date is a material alteration within this section. (Cf. *Vance* v. *Lowther* (1876), 1 Ex. Div. 176.)

To forge or alter or knowingly utter, etc., any cheque or any indorsement or assignment of any cheque is a felony punishable with penal servitude for life. (24 & 25 Vict. c. 98, section 22.)

To draw, sign, or indorse a cheque without authority, or knowingly utter such a cheque, is a felony punishable with penal servitude for fourteen years. (24 & 25 Vict. c. 98, section 23.)

CHAPTER VII.

FORGED SIGNATURES—WHEN THE BANKER IS PROTECTED—ESTOPPEL —WHEN THE DRAWER IS PRECLUDED FROM DENYING THE GENUINENESS OF A SIGNATURE.

58.—Section 24 of the Act provides that—

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

When the "forged or unauthorized signature" is in fact unnecessary to negotiate or pass a title to the cheque, as in the case of a "bearer" cheque, a holder for value can acquire a good title, and is not liable to the drawer or any other party, if he obtains payment of the cheque, since his title cannot be affected by the signature, delivery without indorsement conferring it. (Cf. *Sweeney* v. *Freedman* (1901), 35 Ir. L.T. 187.)

59.—When a cheque is drawn on a banker, and the banker on whom it is drawn pays in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the cheque in due course, although such indorsement has been forged or made without authority. (Section 60.)

(Cf. *Hare* v. *Copland* (1862), 13 Ir. C.L.R. 426.)

This is the chief of the provisions excepted in section 24. The section does not cover the case of a person receiving payment on a forged indorsement (cf. *Ogden* v. *Benas* (1874), 43 L.J. C.P. 259), or a banker paying on a forged drawer's signature. (Cf. *Orr* v. *Union Bank of Scotland* (1854), 1 Macq. 513.)

Whether it would protect a banker paying on a forged indorsement of the drawer's, on a cheque to himself or order, is doubtful. Sir J. Paget thinks that it would. ("Banking," pp. 127-8.)

The payment must be "in the ordinary course of business". A bank paying a crossed cheque in contravention of the crossing could not rely on this section. (Cf. *Smith* v. *Union Bank*, L.R. 10 Q.B., at p. 296.)

Charles v. *Blackwell* (1877), 1 C.P.D. 548, 2 C.P.D. 151, was on 16 & 17 Vict. c. 59, section 19, and it was decided that a banker was protected, who paid the amount of a cheque to an agent, who without any authority so to do, indorsed it "*per pro.*," and kept the proceeds. The loss fell on his principal.

Section 60 undoubtedly covers such a case.

Two colonial decisions have imposed a curious limitation on this section. They are *National Bank* v. *Paterson* [1909], Transv. L.R. 322, and *Smith* v. *Commercial Bank of Sydney* (1910), 11 S.R. (N.S.W.) 382. In each case it was held that the section corresponding to section 60 did not relieve the bank, where the thief presented in person an "order" cheque and forged the indorsement, the section only applying where a bill had been negotiated by indorsement. Both decisions are expressly based on Sir J. Paget's "Banking," pp. 46 *et seq.* Sir John Paget argues that "indorsement" is defined as "indorsement completed by delivery" (section 2); that the signature of an "order" cheque by an ostensible payee is really unnecessary and "without jurisdiction"; that it amounts to a mere receipt. (*Per* Byles, J., in *Keene* v. *Beard*, 1860, 8 C.B. N.S., at p. 382.) I do not, with submission, agree. Byles, J. (*loc. cit.*), was apparently speaking of *bearer* cheques, such as the one in issue there; he compares such indorsement to that of a banknote. Some banks (e.g. the National Bank of India) request persons presenting "bearer" cheques to indorse them. The practice was probably commoner in 1860. Further, section 2 in defining "indorsement" is defining genuine indorsements. It has no application to forged indorsements, with which section 60 is concerned. Where there is a forged indorsement no subsequent ostensible "delivery" can effect a negotiation. There can be no holder or indorsee or real "delivery" in law of a bill, bearing a forged indorsement. (Cf. "Questions and Answers in Banking Practice," 6th ed., 633-5, and Paget's

"Banking," p. 129.) If the indorsement of an "order" cheque by the party presenting it be a superfluity, as Sir J. Paget suggests, why does this act of supererogation by the party presenting it involve the bankers in liability for the forgery? He would not be liable, if he paid it without indorsement, it would seem, if Sir J. Paget's view be correct, any more than if he paid a stolen "bearer" cheque. How can it be material, whether the thief, after forging the indorsement, goes personally to the bank, or sends a confederate, or an innocent third party, such as a commissionaire or messenger boy, to whom there is an ostensible "delivery"? The object of the section was to protect bankers against loss by paying on indorsements of persons, whose signatures they did not know. It seems arbitrary to limit the protection to cases, when the pseudo-indorser chances, after the forgery, to hand on the cheque to some one else.

Under section 19 of 16 & 17 Vict. c. 59, bankers may be protected who pay on forged indorsements in the case of instruments falling outside the Act. A banker's draft, for example, though not within the Act, comes within section 19, which includes "any draft or order upon a banker for a sum of money payable to order on demand". (*London City and Midland Bank* v. *Gordon*, 1903, A.C. 240.) A cheque or rather order on a banker with a receipt form attached, payable only on signature of the receipt, according to Lord Lindley [1903], A.C., at page 252, is apparently not within section 19, nor within section 17 of the Revenue Act, 1883. But Sir J. Paget thinks the passage explainable on other grounds

(cf. *ante*, p. 77), and that such orders are within the last-mentioned Act. He seems to be plainly right. (*a*)

Sections 54 and 55 contain further exceptions to section 24. The material provisions of these have been set out in Chapter II, section 5 and section 16 (b) and (c).

Sections 80 and 82 (set out in Chapter V, sections 49 and 51) protect a banker on whom a crossed cheque is drawn, and the banker who collects such cheques respectively.

60.—A customer of a banker, who by his conduct has led the banker to believe that the signatures of any cheques purporting to be drawn by him are his, whereby the banker has been induced to pay such cheques and has paid them without negligence, may where his conduct is the proximate cause of the payment, be precluded from denying against such banker the genuineness of such signature.

This is on the ground of estoppel. The leading case on this species of estoppel is *M'Kenzie* v. *British Linen Co.* (1881), 6 A.C. 82. The material facts in that case were: A bill purporting to be drawn by M. and indorsed by him to the respondent bank was discounted by the bank for C., who signed as acceptor. On dishonour, notice was sent to M., reaching him late on Saturday, 12 April. On the 14th, the next business day, C. brought the bank a fresh bill, drawn and accepted as before, for a smaller sum, the bank accepting it as a renewal on receiving the difference in cash. On 14 July the bank gave M. notice that the second bill was due on the 17th. On dis-

(*a*) Cf. *Bavins, London and South-Western Bank* (1899), 5 Com. Cas. 1.

honour, the bank gave notice and wrote again to M. on 25 July. On the 29th M. first informed the bank that his signatures to the bill were forged and that he declined to pay. It was held that as M. could not, "with the utmost diligence," have informed the bank of the forgery of the first bill before the second was uttered to it, and as M.'s first intimation of the second bill was the notice of its dishonour, his neglect for fourteen days to inform the bank of the forgeries did not in fact prejudice the bank, inasmuch as no remedy was lost or money advanced in consequence of M.'s silence. If M. had maintained silence at a time when he had reason to believe the acceptor would be allowed to draw against the second bill, he would have been estopped.

Where a customer, whose account was debited with forged cheques, refrained from informing the bank, in reliance on the statement of its agent that his silence would be in the bank's interest, it was held he was not estopped from afterwards setting up the forgeries. "It is obvious," says Lord Watson, in delivering the judgment of the Court, "that the question of estoppel . . . differs widely from the question in *M'Kenzie* v. *British Linen Co.* and similar cases. The ground on which the plea of estoppel rested in these cases was the fact that the customer, being in exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced. Here an agent of the bank had earlier and better information as to the forgeries than the customer himself." (*Ogilvie* v. *West Australian, etc., Corp., Ltd.*

[1896], A.C. 257, at p. 268.) The customer's silence was found, as a fact, to have been honest.

In *Chatterton* v. *London and County Bank* (1890), ("Journal," XI. 333), Day, J., advised the jury that the plaintiff should suffer the loss incurred by repeated alleged forgeries by his clerk. The pass-book, containing in its pocket the alleged forged cheques, had been sent weekly to the plaintiff, who failed to notify the bank of any irregularity, whereby it was induced to go on paying the cheques with the alleged forged signatures. The jury, however, found that the signatures were not forgeries, and though they also found that plaintiff's conduct contributed to the loss, judgment must have been for the defendants in any case on the first finding. The Divisional Court granted a new trial, and was upheld by the Court of Appeal, where it seems to have been thought that there was no obligation on the customer's part to check his pass-book. On the new trial, Matthew, J., told the jury that the plaintiff might have deputed the examination of the book to his clerk, the alleged forger, and the bank could not have complained, though the forgeries would have then been detected no sooner. There was judgment, on the findings on both issues in the plaintiff's favour, for the plaintiff. ("Times," 21 January, 1891; Paget's "Banking," 159.)

In *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.* [1909], 2 K.B. 1010, the facts were these: The secretary of the plaintiff company forged the directors' signatures to several cheques, amounting in all to £2400. The first forged cheque was for £150 on 31

December, 1907. The next forgery was on 29 January, 1908, when two were forged, one for £500. On 6 February there was another for £200. On 8 February another for £300; there were several more, the last being for £250 paid on 3 March. Ordinary board meetings were held during this period, when the finance book was produced for the directors' inspection, but the forged cheques were not noticed, being confirmed with the genuine. The pass-book, with pencil entries of the balance, was taken out at the beginning of January, February, and March. The bank pleaded that the plaintiff company was estopped by its negligence from recovering the value of these cheques. Bray, J., decided against the bank both as regards estoppel and as regards another point—that the return of the pass-book without comment constituted a settled account. (*b*)

In *Morison* v. *London County and Westminster Bank* ([1913], 57 S.J. 427) the plaintiff gave A. authority to sign *per pro.* his firm, B. M. & Co. He gave the N.P. bank authority in 1888 to honour all cheques drawn by A. *per pro.* B. M. & Co. In 1907 A. opened an account with the defendant bank and paid in divers cheques drawn on the N.P. bank and indorsed by him *per pro.* B. M. & Co. In 1908 the plaintiff apparently discovered that A. had been defrauding him, but allowed him to continue in his employ. It seemed

(*b*) See further as to estoppel, *Bank of England* v. *Vagliano* [1891], A.C. 107, and as to the pass-book, Sir J. Paget's "Banking," pp. 156-69. The *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India* (*supra*) rather disposes of Sir J. Paget's "stronger line, that of settled account" (at p. 157). As to "pass-book," see *post*, section 83, p. 141.

that the plaintiff did not then know of A.'s account with the defendant bank. Nor does it appear precisely when he became aware of it, nor how many cheques, fraudulently indorsed, were subsequently paid into his account by A. Coleridge, J., held that by sections 25 and 82, read together, the defendant bank had notice of A.'s limited authority and was under a duty to inquire if he was acting within it. Accordingly, its negligence deprived it of the protection of section 82; further, that section 25 enabled the true owner to recover the amount of cheques paid, and not merely to defend an action; further, that the conduct of the plaintiff in 1908 was not a ratification of A.'s frauds, and that, in the absence of contractual relationship, the plaintiff owed no duty to the defendant bank to see that A. did not exceed his authority; hence there could be no neglect of such duty; alternatively, if there were a duty and neglect of it, the negligence was not the proximate cause of the loss. He gave judgment for the plaintiff. (Cf. *Gompertz* v. *Cook* (1903), 20 T.L.R. 106.)

Negligence to amount to an estoppel must be in the transaction itself and be the proximate cause of leading the party astray, who seeks to set up the estoppel. It must be a neglect of some duty owing to such party or to the general public. (*Arnold* v. *Cheque Bank*; *Arnold* v. *City Bank*, 45 L.J. C.P. 562.) Negligence in the custody of a cheque or in its transmission by post will not estop the true owner from recovering its proceeds from one who has wrongfully obtained possession of it (same cases and *Patent Safety Gun Cotton Co.* v.

Wilson, 49 L.J. C.P. 713), for such negligence is not in the transaction itself, but collateral to it.

In *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co., Ltd.* (1906), 95 L.T. 444, it was held that the appointment as secretary of the company of a person (the son of the chairman) who had previously committed forgery, and the entrusting to him of the company's pass- and cheque-books did not estop the company from disputing the genuineness of cheques forged by the secretary. The previous forgery, several years before, was known only to the chairman of the board.

Sir M. Chalmers (*c*) appears to doubt if, in the *Young* v. *Grote* class of case, the negligence is the "proximate cause" of the loss. There is, of course, the misfeasance as the *immediate* cause. Yet in the law of torts, at least, the effective cause of the damage, not the immediate cause, may be regarded in determining liability for negligence. (Cf. *Engelhart* v. *Farrant* [1897], 1 Q.B. 240 C.A.) And undoubtedly the act of Mrs. Young, in sanctioning the cheque as drawn by Worcester, in lieu of tearing it up, or drawing a line to the left of the words and figures, was the effective cause of the loss.

Where a banker sets up the genuineness of a signature, alleged by the customer to be forged, the onus of proving his case beyond reasonable doubt lies, it is said, on the banker. (*Per* Denman, J., in *Bennett* v. *London and County Bank* (1886), 2 T.L.R. 765.)

(*c*) Cf. *ante*, p. 94.

CHAPTER VIII.

OVERDUE CHEQUES — STALE CHEQUES — POST-DATED CHEQUES — CHEQUES NOT DATED — PRESENTMENT FOR PAYMENT — DISHONOURED CHEQUES—WHEN NOTICE OF DISHONOUR IS NECESSARY — WHEN A BANKER MUST DISHONOUR A CHEQUE — CHEQUES DRAWN WITH NO EFFECTS—WHEN PROPERTY PASSES IN CONSIDERATION OF SUCH CHEQUES—WHEN GIVING SUCH CHEQUES IS CRIMINAL.

61.—A cheque is overdue when it appears on the face of it to have been in circulation for an unreasonable length of time.

What is an unreasonable length of time for this purpose is a question of fact. (Section 36 (3), section 73.)

The cases at common law are *Down* v. *Halling* (1825), 4 B. & C. 330; *Boehm* v. *Sterling* (1801), 7 T.R. 423; *Rothschild* v. *Corney* (1829), 9 B. & C. 388; *Ex parte Hughes* (1880), 43 L.T. 577; *Serrell* v. *Derbyshire Bank* (1850), 9 C.B. 811, and *London and County Bank* v. *Groome* (1881), 8 Q.B.D. 288. It is plain now, whatever may have been the correct view at common law, that the question of fact for the jury is "Was the cheque taken after more than a reasonable time had elapsed since issue?" and not as Field, J., suggested in *London and County Bank* v. *Groome* (*supra*), "Was it taken under circumstances that ought to have excited suspicion?" Taking a negotiable instrument under circumstances that ought

to have excited suspicion in no way, since *Raphael* v. *Bank of England* (1855), 17 C.B. 161, affects the right to recover of a *bonâ fide* transferee, and the test of overdueness laid down by section 36 (3) is such as to render Field, J.'s, decision no longer reliable—quite apart from whether it was itself consistent with the older cases—a subject I examined in previous editions. In *London and County Bank* v. *Wright* ("Journal," XXII. 30; "Times," 27 Nov., 1900), Bucknill, J., left it to the jury to say whether a cheque, delivered conditionally and indorsed to the plaintiffs in breach of the condition, five days' old was taken after more than a reasonable time had elapsed since issue. They found that it was not, and in *Wheeler* v. *Young* (1897), 13 T.L.R. 468, the question of "reasonable time" for presentment of a cheque was treated as entirely one of fact for the jury. Even at common law, judges refused to say that a cheque became overdue as a matter of law after a given time. (Cf. Lord Tenterden, 9 B. & C., at p. 390, and Maule, J., 9 C.B., at p. 826.) Thus I cannot, with submission, agree with Sir J. Paget's view, "As to when a cheque so becomes stale or overdue, see *London and County Bank* v. *Groome*. . . . In the absence of special circumstances, ten days or so would probably be *held* the limit." This implies that judges would hold as a matter of law; but section 36 (3) (*a*) plainly treats the question as one of fact. (Cf. Lord Bramwell, *post*, at p. 116, in *Hopkins* v. *Ware*.) Cases prior to the Act are of no authority unless "they can be shown to be correct and logical deductions from . . . the Act". (*b*) A cheque will not be

(*a*) "Banking," p. 105. (*b*) Chalmers.

refused payment by a banker as "out of date" until six months old, or even a year. (Paget, "Banking," pp. 103-4.) An action will lie on a cheque as on any simple contract for six years after the date of the cheque or the date of its delivery, if later. Time does not run from when it was presented for payment. (Cf. *Christie* v. *Forsick*, 1812, 13th ed., Sel. N.P. 301; *Megginson* v. *Harper*, 1833, 2 C. & M. 322.) Where a loan is made by cheque, time runs from when it was cashed; and not from when it was dated. (*Garden* v. *Bruce*, 1868, L.R. 3 C.P. 306.)

Where a cheque is retained for a time either as security for advances to be made, or because there are no funds to meet it, and the drawer has so informed the holder, time will not run in the drawer's favour, until the advances are made or the duty or right to retain the cheque is otherwise put an end to. (*In re Boyse*, 1886, 33 Ch.Div. 612; *In re Bethell*, 1887, 34 Ch.Div. 56; cf. p. 120, *post*, for facts of latter case.) As against an indorser time would not run, until dishonour, for not until then is there a right of recourse against him. (See Hewitt's "Statute of Limitations," pp. 14 and 15.)

62.—Where an overdue cheque is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had. (Section 36 (2).)

The words "affecting it at its maturity," in the case of a cheque, mean affecting it on the day it is drawn or issued, or between then and the negotiation in question, since a cheque is payable on demand. In the case of bills

not so payable, it is possible for a defect of title to be cured by negotiation to a holder in due course before the bill matures. (Cf. *Chalmers* v. *Lanion*, 1808, 1 Camp. 383.) I have considered the cases in the notes to section 61.

An overdue cheque ceases therefore to be "negotiable," though it is still "transferable".

63.—Where a cheque or any indorsement on a cheque is dated, the date is, unless the contrary be proved, to be deemed to be the true date of the drawing or indorsement as the case may be. (Section 13 (1).)

It is not the practice to date the indorsements on cheques. It might be material to show the order of the indorsements.

64.—A cheque is not invalid by reason only that it is ante-dated, or (c) post-dated, or that it bears date on a Sunday. (Section 13 (2).)

It is now definitely decided that a post-dated cheque is a valid instrument under section 13 (2), and it is not taken out of the general provisions of the Act and of this particular subsection by being post-dated, contrary to the tenor of the first part of section 73.

In *Royal Bank of Scotland* v. *Tottenham* [1894], 2 Q.B. 715, the infant payee of a post-dated cheque indorsed it before the day of date to M., who paid it into her account, and drew against it.

(c) If it is considered of any use to object to a cheque on the ground of its being post-dated, such a defence need not be pleaded. See *Field* v. *Woods* (1837), 8 C. & P. 52, but I conceive that such an objection would now be useless.

It was dishonoured on presentment. Her bankers successfully sued the drawer, as holders in due course. Various contentions were raised by the drawer, which have been dealt with elsewhere.

Before Wills, J., at the trial it was unsuccessfully argued that (1) an indorsement of a post-dated cheque, before the cheque is due, is inoperative, as it is till then an inchoate instrument and in suspense; (2) such a cheque not being payable on demand, is not an instrument within the Bills of Exchange Act, in view of section 73, and an infant could not therefore validly indorse it under section 22.

In the Court of Appeal several points were taken. The material one for our present purpose was on section 38 of the Stamp Act (54 & 55 Vict. c. 39). It provides that "Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped, shall incur a fine of ten pounds, and the person who takes or receives any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever".

It was argued that a post-dated cheque was really a bill at as many days as intervened between the date of issue and the date of the cheque, and that it consequently required the same *ad valorem* stamp as a bill for a like amount not payable on demand, that the cheque in question was not so stamped and could not under the latter part of the first subsection of section 38 be sued upon.

The Court of Appeal decided that such a construction would make a post-dated cheque practically invalid, contrary to section 13 (2) of the Bills of Exchange Act, and was untenable, and that all objections under the Stamp Act must be determined by the conditions existing when the question is raised. The cheque being on the face of it sufficiently stamped at the *date of trial* was therefore properly admissible in evidence and could be recovered upon.

It is conceived, however, that to post-date a cheque may expose the drawer to a penalty under section 5 or section 38 of the Stamp Act. (See Chalmers, p. 387, and Paget, "Banking," p. 43.) It is virtually a fraud on the Revenue. Cheques might be made payable "on demand" at a date three or six months hence, and so avoid the higher duty. A cheque dated 7 June, running "Pay on 10 June," requires a bill stamp, and matures on 13 June.

In *Forster* v. *Mackreth*, L.R. 2 C.P. 163, a partner in a firm of solicitors had authority to draw cheques in the firm's name. He drew a cheque post-dated seven days. An authority to draw bills on behalf of a firm is not an incident of an ordinary, non-trading partnership, such as a firm of solicitors. It was held that the post-dated cheque, given to secure a personal loan, was in reality a bill at seven days, and the firm was not liable thereon to a holder in due course, as the partner had no authority to draw bills in the firm's name.

The (*d*) validity of a post-dated cheque had been de-

(*d*) Cf. also *Whistler* v. *Forster* (1863), 14 C.B. N.S. 248; *Williams* v. *Jarrett* (1833), 5 B. & Ad. 32; *Austin* v. *Bunyard* (1865), 6 B. & S. 687;

cided in *Gatty* v. *Fry*, 1877, 2 Ex.Div. 265, before the present Stamp Act or Bills of Exchange Act. Where the payee of a cheque, which is post-dated, becomes bankrupt between the day of receiving the cheque and the day of date, and notice thereof is sent to the drawer, there is no obligation on the drawer to stop payment of such cheque for the benefit of the payee's (*e*) creditors. (*Ex parte Richdale*, 19 Ch.D. 409.) It might have meantime been negotiated to a holder in due course, to an action by whom the drawer would by stopping payment expose himself.

For another point decided by this case the reader is referred back to section 23.

65.—Subject to the provisions of the Act a cheque must be duly presented for payment. If it be not so presented the indorsers shall be discharged, and the drawer shall be discharged to the extent provided in rule (2) hereunder. A cheque is duly presented which is presented in accordance with the following rules:—

Subject to rule (2) failure to present within a reasonable time does not discharge the drawer of a cheque, as it does the drawer of a bill. (Cf. *Robinson* v. *Hawksford*, 9 Q.B. 52.) He can be sued at any time within six years. (Cf. *Laws* v. *Rand*, 1857, 3 C.B. N.S.

Bull v. *O'Sullivan* (1871), 40 L.J. Q.B. 141; *Misa* v. *Currie* (1875), 45 L.J. Q.B. 852; *Hitchcock* v. *Edwards* (1874), 60 L.T. 636; *Emmanuel* v. *Robarts* (1868), 9 B. & S. 121.

(*e*) Where a garnishee order is served upon the drawer of a cheque between the giving of a cheque for value and the payment thereof, there is no obligation on him to stop payment. (*Elwell* v. *Jackson* (1884), 1 Cab. & E. 362.)

442, a case under the old common law rule, by which, if the drawer had suffered at all by the delay, (*f*) he was discharged, but otherwise remained liable for six years.)

A creditor, taking a cheque of the debtor's agent, must present it within a reasonable time; if, by his failure to do so, it is not met, the debtor will be discharged. (*Hopkins* v. *Ware,* 1869, L.R. 4 Ex. 768; it was not certain if the cheque, a month stale, would have been paid, if presented promptly.)

(1) As regards the indorser, presentment must be made within a reasonable time after its indorsement in order to render the indorser liable. (Section 45 (2).)

(2) As regards the drawer, where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (Section 74 (1).)

(3) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (Section 74 (2).)

(4) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day at the bank whereon the cheque is drawn. (Cf. Section 45 (3).)

The cases prior to the Act lay down as a matter of law the time within which a cheque must be pre-

(*f*) See *Hopkins* v. *Ware*, 38 L.J. Ex. 147.

sented. (*g*) They do not appear to me to possess now any special authority, as the time within which a cheque must be presented is now "a reasonable time," and that is a question of fact (*Wheeler* v. *Young*, 1897, 13 T.L.R. 468, where a jury found, as a fact, that a cheque received on Friday, 26 March, was not presented "within a reasonable time" on the Wednesday following. The holder only lost one day's post in forwarding the cheque, which had to be forwarded again from a branch to the head office for collection. The case arose on section 74.) Speaking of what constituted "unreasonable delay" in presenting a cheque, in *Hopkins* v. *Ware* (1869), LL. 4 Ex. 268, Lord Bramwell said: "It is often difficult to describe to a jury what is such delay, when there is no obligation to present at any precise time". "Perhaps two weeks," he opined, would not be unreasonable, but clearly a month would be unreasonable delay.

No case upon section 45 (2) has yet arisen with regard to a cheque. German Cheque Law (Art. 11) allows ten days for presentment, agreeing pretty closely

(*g*) The cases are *Firth* v. *Brooks* (1861), 4 L.T. 467; *Alexander* v. *Burchfield* (1842), 7 M. & G. 161; *Hare* v. *Henty* (1861), 10 C.B. N.S. 65; *Prideaux* v. *Criddle* (1869), 10 B. & S. 515; *Springfield* v. *Lanezzari* (1867), 16 L.T. 361; *Moule* v. *Brown* (1838), 4 Bing. N.C. 366; *Bailey* v. *Bodenham* (1864), 16 C.B. N.S. 288; *Beeching* v. *Gower* (1816), Holt 313; and others to be noticed in the text. Cf. Chalmers, 275-7; but the common law fixed rules are now subordinated to the statutory recognition of crossing, and the effect of sections 45 and 74 is to import the modern custom of bankers as an element in the calculation of reasonable time. (Cf. Paget, "Banking," 290, and Byles, 17th ed., p. 22.)

with Lord Bramwell's view. Probably no jury would find an indorser to be discharged, if the indorsee delayed a day or two, a fatal *laches* at common law, before presenting or collecting a cheque. Tradesmen, who cash cheques to oblige customers, frequently do so in reliance on the payee-customer's indorsement, ignoring the drawer. It is common knowledge that several days often elapse before such cheques are collected by the tradesman's bank, as it is found convenient to pay in and sign the paying-in slips once or twice weekly. Should such a cheque come back marked "R/D," what jury would find a delay of a day or two "unreasonable," so as to discharge the payee-indorser? The common law cases, fixing the rules I have referred to, were mostly cases of failure to present promptly cheques or bankers' notes, with the result that the parties paying, the banks having failed meantime, were sued for the amounts represented. Moreover, crossing was not, when any of these cases were decided, recognized by statute, and for reasons further explained in "Byles on Bills," Chapter III (17th ed.), little reliance can now be placed on these cases, dating from days when the case of cheques was assimilated to that of bills in this and other particulars, although in modern practice usage has widely distinguished them.

A banker guilty of delay in presenting a cheque is liable to his customer for any resulting loss. (*Hare* v. *Henty* (1861), 18 C.B. N.S. 65; *Boddington* v. *Schlencker* (1833), 4 B. & Ad. 752; *Forman* v. *Bank of England* (1902), 18 T.L.R. 339; cf. *Lubbock* v. *Tribe*, 1838, 3

M. & W. 607.) In *Boddington* v. *Schlencker* it was contended that, by the custom of the city of London, a banker, receiving a cheque from his customer, must, as between himself and the customer, present it the same day, notwithstanding that, as between the customer and the drawer, the former would have a day within which to present it, but the Court, while not satisfied of the existence of the custom, decided that it was in any case inapplicable in the case before them, which was between the payee and the drawer. A country banker guilty of delay in not returning by return of post a cheque he does not mean to pay will be answerable to the collecting banker for damages sustained by his allowing the payee to draw against it, on the supposition that, as it was not so returned, it would be paid. (*Parr's Bank* v. *Ashby*, 1898, 14 T.L.R. 563.)

Where a cheque is expressed to be payable in two places, the holder may present it at either and is not prejudiced by delay consequent upon presenting it at the remoter of such places (*Beeching* v. *Gower*, 1816, Holt, 313), but where a cheque was apparently payable at Norwich or in London, the jury found upon the evidence, that there was a custom to treat such cheques as London cheques, and the defendants, the collecting bankers, were liable for presenting it at Norwich through their country clearing house, whereby it was collected later than it would have been in London, and consequently the plaintiff's cheque, drawn against it the day after he paid it in, was dishonoured. He paid in the cheque on 21 May. It was a rule of the defendant bank that cheques drawn

on city banks, paid in before 3 p.m., could be drawn against next day. The plaintiff drew a cheque on 22 May against the cheque in question, without which he had no balance to meet the cheque he had drawn. Had the cheque he paid in been treated as a city cheque, the cheque he drew would have been honoured. In consequence of its being treated as a country cheque his cheque was dishonoured, and he was held entitled to recover damages for the dishonour of his cheque. (*Forman* v. *Bank of England*, 1902, 18 T.L.R. 339.)

66.—It is further provided by section 74 (3) that, "The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him".

67.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, (*i*) and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (Section 46 (1).) (See notes to section 65.)

By section 46 (2) it is provided as follows:—

Presentment for payment is dispensed with—

(*a*) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected. The fact that the holder has reason to believe the bill (*k*) will on presentment be dishonoured does not dispense with the necessity for presentment.

(*i*) E.g., his illness. (*Firth* v. *Brooks* (1861), 4 L.T. 467.)
(*k*) Includes "cheque" by section 73.

(*b*) Where the drawer is a fictitious person.

(*c*) As regards the drawer, where the drawee or acceptor is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(*d*) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect the bill would be paid if presented.

(*e*) By waiver, express or implied.

Clause (*c*) is the only one calling for comment, as far as cheques are concerned. It will be observed that it covers the common cause of dishonour—"no effects," and presentment is in this case unnecessary. (*Wirth* v. *Austin* (1875), L.R. 10 C.P. 689.)

In *In re Bethell* (1887), 34 Ch.Div. 561, B. gave P. an undated cheque, telling him he had at present no funds, but was expecting a loan and would then have funds to meet it, and he would then telegraph to P., who could fill in the date. On a subsequent occasion he told P. the negotiations for the loan were broken off. It was held (1) that if P. was entitled and bound to hold the cheque for a reasonable time, pending the negotiations for a loan, that right or obligation came to an end when he heard the negotiations were broken off. (2) That presentment for payment was excused under section 46 (2, c), as, when the negotiations were broken off and it was time for presentment, the banker had no funds of B.'s in his hands, and accordingly time ran under the Statute of Limitations from when P. heard that the negotiations had been

broken off, and P.'s claim was statute-barred, as more than six years had since elapsed.

68.—A cheque is dishonoured by non-payment when it is duly presented for payment, and payment is refused or cannot be obtained. (Section 47 (1).)

Subject to the provisions of the Bills of Exchange Act, when a cheque is dishonoured an immediate right of recourse against the drawer and indorsers accrues to the holder. (Section 47 (2).)

This section, of course, was framed for the case of bills. The acceptor of a bill is primarily the person to pay, and he is not, like a banker, the drawer's agent for payment.

69.—Subject to the provisions of the Act, when a cheque has been dishonoured by non-payment, notice of dishonour must be given to the drawer and each indorser, any drawer (*l*) or indorser to whom such notice is not given is discharged. (Section 48.)

That a drawer of a cheque should be discharged by want of notice of dishonour, he corresponding to the acceptor or a bill of the maker of a note, and being the party liable, is indeed an anomaly; yet it seems to be the law. (Cf. *ante*, p. 7.)

Section 49 of the Act provides as follows:—

Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

(1) The notice must be given by or on behalf of the

(*l*) The holder need only give notice to those he intends to sue; an indorser cannot object that the holder never gave the drawer notice. (Cf. *Rickford* v. *Ridge* (1810), 2 Camp. 537.)

holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

(3) Where the notice is given by or on behalf of the holders, it inures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as herein before provided, it inures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A mis-description of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the

party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless—

(*a*) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(*b*) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day; and if there be no such post on that day, then by the next post thereafter.

(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do

so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

For the purpose of giving notice of dishonour the various branches of a bank are distinct parties. (*Clode* v. *Bayley* (1843), 12 M. & W. 51; cf. *Prince* v. *Oriental Bank* (1878), 3 A.C. 325, at p. 332; and *Fielding* v. *Corry* [1898], 1 Q.B., at pp. 273, 274.)

Prideaux v. *Criddle* (1869), 10 B. & S. 515, is a case illustrative of subsection 13. It was held that when the drawees received a cheque on 7 June, and notified B. & Co., the agents of the plaintiff bank, on the 8th, and the plaintiff bank notified the defendant on the 9th, the defendant received due notice of dishonour. It was said, "If the drawer dishonours a cheque, and the holder sends a notice of dishonour to the person from whom he received it on the day following that on which it was dishonoured, that person and each previous transferor has one day within which to give notice of dishonour".

Where a customer pays in a cheque drawn on his bank by another customer, the bank is entitled to the

same time for ascertaining whether the cheque will be paid and for giving notice of dishonour as if the cheque were drawn on another bank. (*Chambers* v. *Miller* (1862), 13 C.B. N.S. 125.)

In *Fielding* v. *Corry* [1898], 1 Q.B. 268, a letter containing notice of dishonour was sent off in time to the wrong branch of a bank. Next day a telegram was sent to the proper branch, which sent off its notices in time. It was held that the bank had received sufficient notice of dishonour.

Collins, L.J., dissented, and I have less difficulty in comprehending his view.

The fact that the notice was not sent in time to the right branch seems to me to make all the notices bad, those given by the bank as well, inasmuch as a notice to be valid must be given by a party liable on the bill, and the bank appears to have been discharged by failure to send off the notices to it in time. Section 49 (12) speaks of when the notices must be "sent off". The only real notice, that by telegram, was *not* sent off to the bank in time.

It has been held in regard to bills that the holder of a bill is entitled to know on the day when it is due whether it is an honoured or dishonoured bill, and that if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. (*Cocks* v. *Masterman* (1829), 9 B. & C. 902; *London and River Plate Bank* v. *Bank of Liverpool* [1896], 1 Q.B. 7, etc.) Such cases have arisen where a bill with a forged acceptance has been paid

by a banker, and next day, the forgery being discovered, notice thereof is given, and the money is sought to be recovered from the recipient of payment.

In *The Imperial Bank of Canada* v. *Bank of Hamilton* [1903], A.C. 49, it was pointed out that this rule could not arise where there is in point of fact no person entitled to notice of dishonour, where the drawer had committed a forgery to the extent to which the cheque in that case exceeded the amount for which it was certified and was entitled to no notice, and there was no indorser entitled to notice.

In that case a cheque certified for five dollars was fraudulently altered to 500 dollars by the drawer. On presentment by a holder for value it was paid. Next day the fraud was discovered, and notice was given to the party who had received payment. It was held that the money paid could not be recovered. There was no one discharged from liability by the omission to give notice on the day of payment, and the rule in *Cocks* v. *Masterman* did not apply. It is said that a banker is not bound to give notice to an agent of the dishonour of a cheque paid in by him, and is not answerable, if through lack of notice, the agent, treating the cheque as good, delivers further goods of his principal to the drawer. ("Journal of the Institute of Bankers," XXIX. p. 82.)

Section 50 of the Act provides as follows:—

(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to

his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with—

(*a*) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:

(*b*) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(*c*) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person; (2) where the drawee is a fictitious person, or a person not having capacity to contract; (3) where the drawer is the person to whom the bill is presented for payment; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill; (5) where the drawer has countermanded payment:

(*d*) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill; (2) where the indorser is the person to whom the bill is presented for payment; (3) where the bill was accepted or made for his accommodation.

In the case of cheques, the two chief causes of dishonour are—

(1) Countermand of payment, and

(2) Absence of effects of drawer in the hands of the banker—i.e., of *sufficient* effects, not necessarily of *any* effects. (See *Carew* v. *Duckworth* (1869), 38 L.J. Ex. 149.)

It will be seen that in each of these cases notice of dishonour is dispensed with as regards the drawer. (See clause (c) of subsection 2, subclauses (4) and (5).) If the customer, though having no effects, were allowed to overdraw under a guarantee or some other arrangement, he would probably be entitled to notice of dishonour. (Cf. *Carew* v. *Duckworth, supra.*)

Even where notice of dishonour is dispensed with, the circumstances dispensing with it must be alleged on the indorsement of a writ specially indorsed under Order III, rule 6, although they need not also be set out in the affidavit in support of summary judgment under Order XIV, rule 1. (*Fruhauf* v. *Grosvenor*, 1892, 61 L.J. Q.B. 717 ; *May* v. *Chidley* [1894], 1 Q.B. 451.)

70.—Where a banker has received notice of an available act of bankruptcy committed by a customer, or where a receiving order has been made against a customer, he is bound to refuse payment of any cheques subsequently presented, drawn by such customer.

(Bankruptcy Act, 1883, sections 9, 49, and 168.)

This may be doubtful in the case of a cheque "marked" or "certified" by the banker. If marked, be-

cause presented after hours, at the instance of another bank, the banker would be bound by the custom of bankers to pay. (*Goodwin* v. *Robarts* (1875), L.R. 10 Ex., at p. 351.) If marked at the holder's or drawer's request, the banker, it seems, might refuse to pay. As regards the holder, there would be no consideration moving from him to the bank to support the bank's promise to pay. In Scotland or in South Africa, Ceylon (where a case of this sort occurred when the author was there), or British Guiana, the bank might be liable to the holder on the implied promise, as there is authority that consideration is not necessary to support a contract under the Scots or Roman Dutch Law. This is the view taken by the Supreme Court of Transvaal, but it does not prevail in Cape Colony. (*Rood* v. *Wallach* [1904], Trans. L.R. 187.) A banker may not, it is said, refuse to pay to another banker a marked cheque, even though he cannot debit the amount to his customer. ("Questions and Answers in Banking Practice," 6th ed., No. 502—an opinion of Sir J. Paget, who refers to *In re Beaumont* [1902], 1 Ch., at p. 895.) As far back as 1810 in *Robson* v. *Bennett*, the custom of marking cheques presented after form was recognized as between banker and banker as equivalent to acceptance. No further authority is to be found until *Gaden* v. *Newfoundland Savings Bank* [1899], A.C. 281 P.C. A marked cheque should be honoured before cheques not so marked previously presented the same day. (*Ib.*, Nos. 503, 504; see generally Paget's "Banking," Chapter VII.) There is another case, where a banker, must, it seems, disregard countermand of payment, even

though unable to debit his customer, and that is, if he has wired to the banker about to collect, that the cheque will be met, and that banker has allowed it to be drawn against or has paid it, in reliance on the telegram, a stop order being received by the drawee banker subsequent to the dispatch of his telegram. Collecting bank wires the drawee bank: "Will A. B.'s cheque for £150 in favour of C. D. be paid?" Answer, "Yes, if in order". A. B.'s balance is £180 after dispatch of wire, a cheque of A. B.'s for £100 is presented over the counter. Can the drawee banker dishonour it? ("Questions and Answers in Banking Practice," 6th ed., p. 520-3.)

When a garnishee order *nisi* has been served on a banker, he is justified in dishonouring all cheques of the customer in respect of whose debt the order has been obtained, notwithstanding that the judgment against the customer may be for a less sum than the amount standing to his credit at the bank. (*Rogers* v. *Whiteley* [1892], A.C. 118. See Order XLV, rr. 1 and 2.)

A garnishee order is an order attaching a debt due from a third person to a judgment debtor; e.g., A. gets judgment against B. for £50. C. owes B. £25. A. by a garnishee order attaches that £25 in C.'s hands.

A banker may disregard a garnishee order *nisi* unless it correctly designates the debtor and the account it attaches.

The onus is not on the banker to ascertain to which account the order relates. (*Koch* v. *Mineral Ore Syndicate, Lon. and S.-W. Bank Garnishees*, 54 S.S. 600.)

Notice of a writ of sequestration against a customer

does not disentitle a banker to honour his cheques. (*In re Pollard*, 1892, W.N. 144.) But a sequestrator may, under such a writ, attach a balance and the banker must disclose it. (*Miller* v. *Huddlestone*, 1882, 22 Ch.Div. 233.) Where A. sued his wife for £11,150, value of bonds he alleged she had stolen, and she had a letter of credit to the P. bank for that sum, A. could not obtain an injunction restraining the bank from honouring his wife's drafts, though she might have been restrained from drawing, and notice of such an injunction would oblige the bank to dishonour her drafts. (*Fontaine Besson* v. *Parr's Banking Co.*, 1895, 12 T.L.R. 121; cf. *Seaward* v. *Paterson* [1897], 1 Ch. 545.)

71.—The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment.

(2) Notice of the customer's death.

In *Curtice* v. *London City and Midland Bank, Ltd.* [1908], 1 K.B. 293, the plaintiff on 31 October, 1906, drew a cheque on a branch of the defendant bank as the price of three horses, in favour of J. J. not delivering the horses, and not explaining his failure to the plaintiff's satisfaction, the plaintiff, after informing J. of his intention, wired to the defendant's branch stopping the cheque. The telegram reached the bank at 6.15 and was placed in the letter-box. By an oversight it was allowed to remain there until the morning of 2 November, when it was taken out with a letter from the plaintiff confirming the stop order. The bank had paid the cheque on the 1st. In the Court of Appeal two ques-

tions were raised: (1) whether there can be countermand by telegram; (2) whether in this case the cheque had in fact been countermanded. Cozens Hardy, M.R., said that "A telegram may . . . be acted on by the bank at least to the extent of postponing the honouring of the cheque, until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque." Fletcher Moulton, L.J., said: "It must be a question in each case as to whether the agent has behaved reasonably in acting or not acting on the telegram". Farwell, L.J., said: "The banker is simply put on inquiry by the receipt of a telegram and his duty is not to pay at once, but to make inquiries". The Court were agreed that there is no such thing as constructive notice of countermand. The bank might be answerable in damages for negligence in not opening the telegram on the 1st; but the measure of damages would be different. *Qu.* If an indorser does not through negligence open a letter containing a notice of dishonour, until a day too late, can he be heard to say that he had no notice within the time? Would he not have "constructive notice"?

The death of one of two partners does not determine the authority of the survivor to draw cheques on the firm's account. (*Backhouse* v. *Charlton* (1878), 8 Ch.D. 444.) In the case of the decease of an office-holder, the drawer of a cheque, as such, it seems that a banker may pay notwithstanding the death. ("Ques-

tions and Answers in Banking Practice," 5th ed., 551.)

A drawer, it is said, may not countermand payment of a cheque "marked" at his own request. (Paget's "Banking," 91-2.) But there is no judicial authority in support of this. A drawer might, after procuring his cheque to be "marked," find a total failure of consideration moving from the other party—the payee. If his banker paid such a cheque, notwithstanding a stop order, whatever the practice of bankers may be, his right to debit the drawer's account would seem very questionable. A banker may regard the stop order of one partner as an authority not to pay a firm's cheque. (Lindley, "Partnership," 7th ed., 158.) So also in the case of trustees' cheques. ("Questions and Answers in Banking Practice," 6th ed., No. 529.)

72.—Where a cheque is given as payment for goods, and the cheque is subsequently dishonoured, the property will pass to the vendee, if he had no preconceived design not to pay and had reasonable ground to believe the cheque would be paid.

(*Bristol* v. *Wilsmore* (1823), 1 B. & C. 514; *Hawse* v. *Crowe* (1826), R. & M. 414.) The question of the intent with which a worthless cheque is given is for the jury. (*Bristol* v. *Wilsmore*, *supra*.) In *Loughnan* v. *Barry* (1871), 5 Ir.R. C.L. 538, it is said that the question is not whether he had reasonable grounds to believe the cheque would be paid, but whether he had such grounds for believing he had funds to meet it.

73.—Where he had no such reasonable ground, then, inasmuch as he obtained the goods by fraud, he acquires a title to

the goods, which is voidable at the election of the vendor, but he can, until his title is avoided, make a good title to a bonâ fide purchaser.

(Sale of Goods Act, sections 23 and 24 (2).)

In *Hawse* v. *Crowe*, *supra*, it was said that if the vendee had no such reasonable belief, the transaction was fraudulent, and the vendor could recover the goods. And so he could to this day as against the vendee, but not as against a *bonâ fide* purchaser from him, in view of section 23 and section 24 (2). Where a banker exchanges negotiable securities for a bill-broker's cheque, the securities pass absolutely, should the cheque be dishonoured. There is no custom, which can be recognized as part of the law merchant, that the securities must be returned if the cheque is unpaid. (*Lloyd's Bank* v. *Swiss Bankverein*; *Union of London and Smith's Bank* v. *Swiss Bankverein*, 1913, 57 S.J. 245.)

Hawse v. *Crowe* was before the Sale of Goods Act; had it been necessary to decide whether a purchaser from vendee had any title, the decision might have been different from what it would be to-day.

The giving of a worthless cheque in exchange for cash or goods does not amount to obtaining money or goods by false pretences, unless it be proved that the so giving amounted to a representation that the prisoner had authority to draw the cheque, or that the cheque was a good and valid order for the then payment of money; such representation is to be deemed to be a representation of fact and not of a future event. Proof that at the time of giving the cheque the prisoner knew

that he had no funds in the bank is not *per se* enough, as it does not amount to a false pretence that the prisoner had money in the bank, since he might have been permitted to overdraw as a matter of favour or arrangement, or might have expected to have the money, when the cheque was presented.

(*R.* v. *Parker* (1837), 2 M.C.C. 1; *R.* v. *Hazelton* (1874), 13 Cox, C.C. 1.)

In the former case the prisoner had no account at the bank on which he drew. In the latter he had an account but no balance. The fraudulent intent was transparent in the first case. The only difficulty was a technical one —whether the representation was not of a future event as opposed to an existing fact, and six eminent judges on this ground thought the conviction wrong, and Brett, J., in the latter case shared their doubts, but felt bound by the decision of the majority in *Parker's Case*.

In *Hazelton's Case* there was ample evidence of a fraudulent intent. Several cheques had already been dishonoured, and the prisoner knew he would not be allowed to overdraw, and in giving one of the cheques he said, "he wished to pay ready money". The conviction, therefore, was upheld on the authority of *Parker's Case* as to the false pretence that the cheque was a good and valid order, and it was also held that a false pretence that the prisoner had authority to draw the cheques was well established. To obtain goods by a worthless cheque on a closed account is to obtain goods, not credit, by false pretences. (*R.* v. *Cosnett* (1901), 20 Cox, C.)

As between the banker and the payee, property passes

as soon as the cash or notes given in payment of the cheque are delivered into the physical possession of the payee. (See *Chambers* v. *Miller*, 1862, 13 C.B. N.S. 125, in which case the payee was counting over the money a second time, and it was held that the banker could not demand a return of it. See also *R.* v. *Prince*, 1868, 32 L.T. 700 ; 11 Cox, C.C. 193.)

CHAPTER IX.

CHEQUES AS EVIDENCE—WHAT A CHEQUE IS EVIDENCE OF—PASS-BOOK AS EVIDENCE.

74.—The production of a cheque drawn by the debtor payable to and indorsed by a person, suing as creditor, is evidence of payment, and the production of a cheque indorsed by a person employed to receive payment on behalf of such creditor is evidence of payment.

(*Egg* v. *Barnett* (1800), 3 Esp. 196.)

75.—But the production of a cheque drawn by the debtor payable to the creditor, but not having been indorsed by him nor otherwise shown to have passed through his hands, is not evidence of payment.

(*Egg* v. *Barnett, supra,* Lord Kenyon, at p. 197.)

It is open to the creditor to show that the cheque was given in respect of a transaction other than that whereon he is suing. (Same case, Lord Kenyon, *loc. cit.*)

76.—The drawer need not show that he gave the cheque to the creditor, provided there is evidence, from the creditor's indorsement or otherwise, that the cheque passed through the creditor's hands.

Mountford v. *Harper* (1847), 16 M. & W. 825, explaining *Lloyd* v. *Sandilands* (1818), Gow, 15, where, if

the report be correct, Dallas, C.J., decided that proof of B. drawing a cheque (evidently a "bearer" (*a*) cheque) payable to A., and of A. receiving payment, is not evidence to show that B. paid the cheque to A., "as it might have been given to a third person, and through that third person might have got into the hands of A." (at p. 16). Alderson, B., in the later case, said that the cheque in the *earlier* was held not to be proof of a debt, and that Dallas, C.J., was erroneously reported as saying that it was not proof of payment. The action was to recover money lent. Dallas, C.J., observed "the plaintiff and defendant are not by this evidence connected with the cheque". When the parties were incompetent as witnesses, such questions were more likely to arise.

Where a cheque is payable to "Order," the indorsement of the payee would be evidence that he received the cheque direct from the drawer, as no title can be made by delivery of an unindorsed order cheque. (*Whistler* v. *Forster*, 1863, 32 L.J. C.P. 161.)

77.—The production of a cheque not presented is not per se evidence of a debt from the drawer to the payee.

(*Pearce* v. *Davis* (1834), 1 M. & Rob. 365.)

78.—The production of a cheque is primâ facie evidence, not of a loan by a banker to his customer, but of a repayment.

(*Pearce* v. *Davis*, *supra.*)

In *Fletcher* v. *Manning* (1844), 12 M. & W. 571, the

(*a*) Order cheques were not in practical use before 16 & 17 Vict. c. 59 was enacted and are referred to by Cockburn, A.G., in opening *R.* v. *Palmer* (1856), as a new sort of document.

plaintiffs, assignees of C., a bankrupt, sought to prove a debt due to J. L. & Co., as petitioning creditors in the bankruptcy of C.

They produced cancelled cheques drawn on J. L. & Co. by C., and a clerk from J. L. & Co. stated, from recollection only, that at the time when these were drawn C.'s account was greatly overdrawn. As the books were not in Court, the cheques were rejected as evidence of a debt from C. to J. L. & Co., since *primâ facie* they were evidence only of a repayment of a debt by J. L. & Co. to C., C. being a customer of J. L. & Co., his bankers.

79.—The production of a cheque drawn by the plaintiff payable to the defendant, and proved to have been paid to him, is not evidence per se to establish a loan by the plaintiff to the defendant, rendering the defendant the plaintiff's debtor. It is rather, in the absence of proof of any loan transactions, to be presumed to be a repayment by the plaintiff of a debt due to the defendant.

(*Carey* v. *Gerrish* (1801), 4 Esp. 9, Lord Kenyon; *Graham* v. *Cox* (1848), 2 C. & K. 702.)

In *Aubert* v. *Walsh* (1812), 4 Taunt. 293, it was held that the defendant could not set off a cheque paid by him to the plaintiff, as, without further evidence, there was nothing in this to show a debt due from the plaintiff to the defendant, i.e., *primâ facie* the cheque was a repayment, not a loan by defendant to plaintiff.

80.—A cheque, though primâ facie evidence of a repayment, may be shown by other evidence to have been a loan by the drawer to the payee.

(*Boswell* v. *Smith* (1833), 6 C. & P. 60. Tindal, C.J., left it to the jury to say whether a cheque for £100 was a repayment of a debt of £32 and something more, or was a loan of £100.)

81.—Where a cheque is not received as money, and is not cashed, it will not operate as evidence of a payment. To operate as a payment, a cheque must be unconditional.

Hough v. *May* (1836), 4 A. & E. 954, where the jury found that an uncashed cheque for £8 11s. was not received as part payment of a bill for £8 18s., and found for the plaintiff for the latter sum, leave being reserved to the defendant to move to reduce the verdict to 7s. if the Court thought the cheque a payment. In discharging the rule, Denman, C.J., said, "The cheque of itself could not be any payment. It must have either been accepted at the time as money by the party taking it, or it must have been afterwards paid." (2 H. & W., at p. 34.)

A party receiving a cheque, and refusing it as payment, may commence action, before returning the cheque. (*Per* Littledale, J.) As to when a cheque lost in the post is payment, see *ante*, pages 46-7, and *post*, page 145.

82.—The acceptance by a creditor of a cheque in his favour drawn by the debtor operates as a payment, unless the cheque be dishonoured.

(*Pearce* v. *Davis*, *supra* ; *Bridges* v. *Garrett* (1870), L.R. 5 C.P. 451; *Pape* v. *Westacott* [1894], 1 Q.B. 272.) In *Bridges* v. *Garrett* the cheque was paid to a mutual agent of the parties, and crossed to his banker,

who detained it on account of a debt due to him from the agent; held a good payment against the creditor. In *Pape* v. *Westacott* the cheque was dishonoured. Where A. assigned "all outstanding debts," *inter alia*, this did not include cheques held by him but not yet presented for payment. The payment subsequently made related back to the time of delivery. (*F. Hadley & Co.* v. *F. Hadley* [1898], 2 Ch. 680.)

83.—Entries in a banker's pass-book are not conclusive against the banker, unless the customer by acting upon them as correct has estopped the banker from denying the truth of them. Until corrected, the customer may act upon them as correct. The banker's right to correct the account may be conditional on the customer not having altered his position in reliance on the erroneous statement of balance.

(*Commercial Bank of Scotland* v. *Rhind*, 1860, 3 Macq. H.L. 643; *Vagliano* v. *Bank of England*, 1889, 23 Q.B.D. 243; *Bank of England* v. *Vagliano* [1891], A.C., at pp. 116, 128; *Gaden* v. *Newfoundland Bank*, 1899, A.C., at p. 286; *London and County Bank* v. *Chatterton* (1890), Paget, pp. 156-60, cited in [1909], 2 K.B., pp. 1027-28; *Holland* v. *Manchester and Liverpool District Banking Co., Ltd.* (1909), 14 Com. Cas. 241; *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India* [1909], 2 K.B. 1020; Paget's "Legal Decisions Affecting Bankers," II, at p. 222.) The cases of *London and County Bank* v. *Chatterton* and *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India*, are strongly against the existence of any implied contract by the customer that he will personally examine his

pass-book and against the view that he may be estopped, if he neglect to do so, from denying forgeries of cheques, which such examination would have detected. As all bankers expressly request their customers to examine and return pass-books monthly at least, the running of a current account might be deemed to be an implied acceptance of this duty as part of the general duty of customer to banker. But, as in the case of cheques negligently drawn, the Courts refuse to recognize the duty of the customer to behave as an ordinarily prudent business man, and the banker is required to suffer the consequences of neglect of the precautions he especially requests of the customer. Lord Esher opined that the customer was "not bound to look at his pass-book" and that a banker has no right to infer that he has from his returning it! (Cf. *ante*, p. 104.)

Subject to the provisions of the Bankers' Book Evidence Act (42 & 43 Viet. c. 11), a copy of an entry in a banker's book, which term includes ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank, is in all legal proceedings, civil or criminal, including arbitrations, and for or against anyone, to be received as *primâ facie* evidence of such entry and of the matters, transactions, and accounts recorded therein, provided that proof be given that the book was at the time of making the entry one of the ordinary books of the bank, and is in the custody or control of the bank, and that the entry was made in the ordinary course of business. (42 & 43 Viet. c. 11, sections 3, 4, and 10.)

By section 5 it must be proved that the copy has been examined with the original.

Section 9 defines what is a "bank" and a "banker" within the Act.

By section 6 the bank is not compellable to produce the original books, in proceedings to which it is not a party, without an order of the Court.

An order to inspect and take copies of entries in the bank books may be obtained, but the bank is to be served three clear days before such order is to be obeyed. (Section 7.)

I cite these provisions because cases may occur in which the cancelled cheques are not available, having been lost or destroyed, and it may therefore be necessary to have recourse to the entry in the bank books. If for example the defendant A. B. swears he paid X. Y. a cheque for £10 for a bill for hire of horses and cannot produce the cancelled cheque, proof that, on or about the day when he swears he drew it, a cheque for £10 payable to X. Y. was placed on the debit side of A. B.'s account, throws on X. Y. the burden of proving that it was a cheque given in respect of some other transaction. It has been regretted by judges that bankers do not credit cheques to customers, except as "cash" or "cheque" or "sundries"; there is generally nothing to identify the drawer. In X. Y.'s pass-book the entry would merely be £10 to his credit, and there would be nothing to show that it was really A. B.'s cheque for £10.

CHAPTER X.

CHEQUES AS TENDER, ACCORD AND SATISFACTION—CHEQUES AS PAYMENT—CHEQUES AS DONATIONES MORTIS CAUSA AND INTER VIVOS.

84.—A cheque is not legal tender, but if the creditor objects to receive it on some other ground, as that it is for the wrong amount, he is to be taken to have waived the objection to the cheque as tender in point of form.

(*Jones* v. *Arthur* (1840), 8 Dowl. Points of Practice, 442.)

There is a note on page 187 of Tidd's "Practice," 9th edition, that in *Willy* v. *Warren*, 1787, Buller, J., held that a draft on a bank was good tender, if not objected to on the ground of form.

The case is also mentioned in Roscoe, Ev., page 349, 9th edition.

85.—The acceptance of a cheque in payment for a larger sum due (subject to an inference of fact that it was not accepted in full satisfaction) amounts to an "accord and satisfaction," and the creditor accepting such cheque cannot sue for the balance of the debt originally due.

(*Goddard* v. *O'Brien* (1882), 9 Q.B.D. 37.)

The doctrine of "Accord and Satisfaction" is this: The acceptance of a smaller sum of money in satisfaction

of a larger debt does not amount to an "accord and satisfaction," nor preclude the creditor suing for the balance, but the acceptance of a thing, not being money, of smaller value than the debt due does amount to an accord and satisfaction, and precludes the creditor from suing for the difference in value. A cheque is a negotiable instrument and is not cash, and hence the acceptance of it may amount to "accord and satisfaction".

86.—Where a cheque is tendered in full payment of a debt, it may be retained by the payee as a payment on account of a larger debt. The mere retention of the cheque is not conclusive evidence of an accord and satisfaction. It is question of fact in any case, whether such a cheque has been retained by the creditor as a payment on account or as an accord and satisfaction.

(*Ackroyd* v. *Smithies*, 1880, 54 L.T. 130; *Day* v. *McLea* (1889), 22 Q.B.D. 610.)

87.—An unconditional cheque may be payment, if accepted as such, and may be payment, where never received by the payee, if sent at his invitation or by his concurrence and in accordance with his directions. An agent's cheque, taken where there was only authority to take cash in payment, will be a discharge of the principal, though dishonoured, if the agent had at the time of giving the cheque, funds of the principal sufficient to pay in cash.

Cf. *Hough* v. *May* (1836), 4 Ad. & E. 964; *Warwick* v. *Noakes* (1820), Peake, 93; *Norman* v. *Ricketts* (1886), 3 T.L.R. 182; *Thairlwall* v. *Great Northern Railway Co.* [1910], 2 K.B. 509; *Carmarthen Railway Co.* v. *Manchester Railway Co.* (1873), L.R. 8 C.P. 685,

where the issue was—did A. pay B. a certain sum, which, on proof of payment, he was entitled to recover from C. Proof that on 25 February A.'s secretary sent a cheque to B. and got a receipt and that B.'s cashier received the cheque and sent the receipt on the morning of the 26th, was held to sustain an action brought that day, without proof that the cheque was honoured.

88.—There can be no valid donatio mortis causâ of a cheque drawn by the donor unless it be paid or negotiated in his lifetime.

(Cf. *Tate* v. *Hilbert*, 1793, 2 Ves. Jun. 111, at p. 120; *Rolls* v. *Pearce*, 1877, 5 Ch.D. 730; *Veal* v. *Veal*, 1859, 29 L.J.Ch. 321; *Bouts* v. *Ellis*, 1853, 4 D.M. & G. 249; *In re Mead*, 1880, 15 Ch.D. 651; *Hewitt* v. *Kaye*, 1868, L.R. 6 Eq. 198; *In re Beak's Estate*, 1872, L.R. 13 Eq. 489, where the pass-book was delivered with the cheque.)

We have seen that, by section 75 of the Act, the banker's authority to pay a cheque is revoked by notice of drawer's death or by countermand of payment. Hence the failure of a gift of a cheque on the drawer's death, as the donee cannot sue the estate in the absence of consideration.

In *Tate* v. *Hilbert* (*supra*), it is clearly laid down that there can be no valid *donatio mortis causâ* of the donor's cheque, which is intended as an immediate gift, unless it is cashed or negotiated in the lifetime of the donor. (See 2 Ves. Jun., at p. 118.)

In *Rolls* v. *Pearce* (*supra*), Malins, V.-C., held that a negotiation by the donee in the donor's lifetime saves a

gift of a cheque from failing. Thus where a man *in extremis* gave two cheques to his wife, which she negotiated before his death, he held that there had been a good *donatio mortis causâ*. *Sed quære* if cheque had been payable to bearer. (Cf. *Bouts* v. *Ellis*, *supra*.)

A gift of a banker's deposit note with a form of cheque on the back, is good as a gift of the deposit note, if the cheque be filled in for the whole amount of the deposit; *secus* if filled in for a smaller sum. (*In re Dillon* (1890), 44 Ch.D. 76; *In re Mead*, *supra*.) The law of Scotland appears to recognize as valid a *donatio mortis causâ* of a cheque (Wallace and McNeil's "Banking Law," 3rd ed., 206).

89.—There can be a valid donatio mortis causâ of a cheque drawn by another and payable to bearer or to the donor or order, even though in such latter case the donor die without indorsing such cheque.

(*Veal* v. *Veal*, *supra*; *In re Mead*, *supra*; *Clement* v. *Cheesman*, 1884, 27 Ch.D. 631.)

90.—There can be no valid donatio inter vivos of a cheque, drawn by or payable to the donor, not paid, negotiated or presented in the donor's lifetime.

(*Tate* v. *Hilbert*, *supra*; *Jones* v. *Lock*, 1865, 35 L.J. Ch. 117; *Rolls* v. *Pearce*, *supra*.) In *Bromley* v. *Brunton* (1868), L.R. 6 Eq. 275, the cheque was presented in the donor's lifetime, but not paid, owing to the bank doubting the signature. It was held that, as the gift was as complete as the donor and donee could make it, it was good as a gift *inter vivos*. In *Jones* v. *Lock*, the cheque

was payable to the donor, and Cranworth, C., treated it as a "bearer" cheque, though there was no evidence of this.

Bromley v. *Brunton* was distinguished in *In re Beaumont* [1902], 1 Ch. 889, where there was the additional fact that the drawer's account was overdrawn, and there was held to be no valid *donatio mortis causâ*.

In all cases there must be a delivery, not merely indorsement, of the cheque in the lifetime of the donor (*Bromage* v. *Lloyd*, 1847, 1 Exch. 32), and no reservation of disposition over it. (Cf. *Reddel* v. *Dobree*, 1839, 10 Simons, 244.)

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